

CHILD SEX TOURISM IN SOUTH AFRICAN LAW

by

KASTURI CHETTY

Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM

In the Faculty of Law at the
Nelson Mandela Metropolitan University

JANUARY 2007

Supervisor: Prof PHG Vrancken

ACKNOWLEDGEMENTS

I wish to thank Professor Patrick Vrancken for all his assistance, guidance and time with this dissertation. I have been extremely fortunate to have him as a supervisor.

Special mention must be made of Karen Hollely. I am indebted to her for putting me on the right track and providing me with contacts and ideas which proved to be fruitful. My visit to the Child Witness Unit and meeting her made all the difference.

I would also like to thank Dawn Prinsloo at NMMU Library for all the invaluable assistance with research.

I am indebted to the following people for taking time out of their busy schedules to assist me with acquiring information and for sharing their expertise and insight with me: George Hardaker, Senior Special Investigator at the National Prosecuting Authority (Asset Forfeiture Unit); Joan Van Niekerk, the National Coordinator of Childline South Africa; Advocate Nolwandle R Qaba at the National Prosecuting Authority; Delene Ritter of Child Welfare South Africa, Port Elizabeth and Captain Colin Morris of the Johannesburg F.C.S Unit. I greatly appreciate the interest they have shown in my work.

I wish to extend my appreciation to Erina Strydom at the NMMU Law Faculty for assistance with layout and technical details.

I am grateful to the following people and organisations for their prompt response to my requests for information: V.H Kariem of Child Welfare South Africa, Port Elizabeth; Ronel van Zyl of the South African Law Reform Commission; WorldVision; Peter Michaels, Senior Monitor of the Parliamentary Monitoring Group; Philippa Crooks, Personal Assistant to the Chief Executive of Unicef Australia; Mark Kenny and Advocate Pierre Smith of the National Prosecuting Authority; Craig Muller of Warm Blankets and Jacqueline Gallinetti at UWC.

Lastly, I wish to thank all the family and friends who assisted in any way.

KEYWORDS

1. Child sex tourism
2. International law
3. Children's rights
4. South Africa
5. Commercial sexual exploitation
6. Child trafficking
7. Child protection
8. Organised crime
9. Internet Crime
10. Forced labour

TABLE OF CONTENTS

| | PAGE |
|---|-------------|
| TABLE OF STATUTES AND BILLS | v |
| TABLE OF CASES | vi |
| SUMMARY | vii |
| CHAPTER 1: INTRODUCTION | 1 |
| 1. General | 1 |
| 2. What is child sex tourism? | 1 |
| 3. Causes..... | 3 |
| 4. Consequences | 7 |
| 5. The extent of the problem in SA | 8 |
| 6. A child sex tourism case in SA | 11 |
| 7. Purpose of the dissertation | 15 |
| 8. Structure of the dissertation..... | 15 |
| 8.1 Chapter 2: International Law Pertaining to Child Sex Tourism..... | 15 |
| 8.2 Chapter 3: Child Sex tourism as a Sexual Offence | 16 |
| 8.3 Chapter 4: Child Protection Laws Pertaining to Child Sex Tourism | 16 |
| 8.4 Chapter 5: Other Issues Related to Child Sex Tourism | 17 |
| 8.5 Chapter 6: Conclusions & Recommendations | 17 |
| 9. Conclusion..... | 17 |
| CHAPTER 2: INTERNATIONAL LAW PERTAINING TO CHILD SEX TOURISM 19 | 19 |
| 1. Introduction | 19 |
| 2. International Custom and Treaties | 19 |
| 3. The Place of International Law in South Africa | 21 |
| 4. Protection of Children’s Rights at World Level..... | 25 |
| 4.1 The United Nations Convention on the Rights of the Child | 25 |
| 4.2 United Nations Commission on Human Rights Resolution on the Rights of the Child..... | 30 |
| 4.3 Declaration and Agenda of Action..... | 31 |
| 4.4 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography | 33 |
| 4.5 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others | 35 |
| 4.6 United Nations Convention Against Transnational Organised Crime and Palermo Protocol..... | 37 |
| 4.7 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour | 39 |
| 4.8 The Convention on the Elimination of Discrimination Against Women..... | 41 |
| 5. Protection of Children’s Rights at Regional Level | 44 |
| 5.1 African Charter on the Rights and Welfare of the Child..... | 45 |
| 6. Conclusion..... | 49 |

| | |
|--|----------------|
| CHAPTER 3: CHILD SEX TOURISM AS A SEXUAL OFFENCE..... | 52 |
| 1. Introduction | 52 |
| 2. The Sexual Offences Act | 52 |
| 3. Common Law | 61 |
| 3.1 Indecent Assault | 62 |
| 3.2 Rape..... | 63 |
| 3.3 Abduction | 64 |
| 3.4 Kidnapping | 65 |
| 4. Sexual Offences Bill..... | 66 |
| 4.1 Background | 66 |
| 4.2 Object and Purpose of the Bill | 68 |
| 4.3 Child Sex Tourism | 69 |
| 4.4 Child Trafficking | 70 |
| 4.5 Child Prostitution | 72 |
| 4.6 Consensual Rape | 74 |
| 4.7 Consensual Sexual Assault..... | 76 |
| 4.8 Exposure to Pornography and Flashing | 77 |
| 4.9 National Protection Register | 77 |
| 4.10 Extraterritoriality | 79 |
| 5. Conclusion..... | 80 |
| CHAPTER 4: CHILD PROTECTION LAWS PERTAINING TO CHILD SEX TOURISM..... | 82 |
| 1. Introduction | 82 |
| 2. The Children's Charter of South Africa..... | 82 |
| 3. The Constitution | 84 |
| 4. The Child Care Act | 86 |
| 5. Domestic Violence Act | 89 |
| 6. Children's Act | 90 |
| 6.1 Background | 90 |
| 6.2 Guiding Principles..... | 92 |
| 6.3 Sexual Abuse..... | 93 |
| 6.4 A Child in Need of Care..... | 94 |
| 6.5 Trafficking..... | 95 |
| 6.6 National Child Protection Register | 98 |
| 6.7 Enforcement of Act | 99 |
| 7. Conclusion..... | 101 |
| CHAPTER 5: OTHER ISSUES RELATED TO CHILD SEX TOURISM..... | 103 |
| 1. Introduction | 103 |
| 2. Prevention of Organised Crime Act | 103 |
| 3. Immigration Act | 106 |
| 4. Basic Conditions of Employment Act..... | 108 |
| 5. Films and Publications Act | 111 |
| 6. Electronic Communications and Transactions Act | 113 |
| 7. Conclusion..... | 115 |
| CHAPTER 6: CONCLUSION | 117 |
| BIBLIOGRAPHY | 119 |

TABLE OF STATUTES AND BILLS

Basic Conditions of Employment Act 75 of 1997

Child Care Act 74 of 1983

Child Care Amendment Act 13 of 1999

Children's Act 38 of 2005

Children's Bill 70D of 2003

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Law (Sexual Offences) Amendment Bill 50 of 2003

Criminal Law (Sexual Offences and Related Matters) Amendment Bill B-2006

Criminal Procedure Act 51 of 1977

Domestic Violence Act 116 of 1998

Electronic Communications and Transactions Act 25 of 2002

Films and Publications Act 65 of 1996

Films and Publications Amendment Act 34 of 1999

General Law Fourth Amendment Act 132 of 1993

Immigration Act 13 of 2002

Prevention of Organised Crime Act 121 of 1998

Recognition of Customary Marriages Act 120 of 1998

Refugees Act 130 of 1998

Riotous Assemblies Act 17 of 1956

South African Schools Act 84 of 1996

Sexual Offences Act 23 of 1957

TABLE OF CASES

Bhe & Others v Magistrate, Khayelitsha & Other Case 2005 (1) SA 580 (CC)

Carmichele V Minister of safety and Security 2001 (4) SA 938 (CC)

Centre for Child Law & Another v Minister of home Affairs and Others Case No: 22866 unreported (High Court of South Africa (Transvaal Provincial Division))

De Reuck v Director of Public Prosecutions Witwatersrand Local Division, 2004 (1) SA 406 (CC); 2003 (2) SACR 455

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

R v Soucut Ally 1907 TS 338

R v Z [204] 1960 (1) SA 739 (A)

S v Abrahams 2002 (1) SACR 116 (SCA)

S v Baloyi 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC)

S v H 1988 3 SA 545 (AD)

S v Jordan and Others 2002 (6) SA 642 (CC); 2002 11 BCLR 1117 (CC)

S v Jordan and Others 2002 (1) SA 797 (T)

S v Makwanyane 1995 (3) SA 391 (CC); 1995 BCLR 665 (CC)

SUMMARY

Child sex tourism is tourism organised with the primary purpose of facilitating a commercial sexual relationship with a child. It involves a segment of the local child sex industry that is directly connected to both an international and domestic tourist market. The increase of tourism has brought with it complications in that tourism is being used as a means for sex tourists to initiate contact with children. Aside from child sex tourists who are paedophiles, there are those who engage in the opportunistic exploitation of children while travelling on business or for other reasons. There are a number of social and economic factors leading to child sex tourism and the effect is that child victims are exposed to immediate harm, irreversible damage and even death.

As South Africa's tourism industry expands into one of the country's top earners of foreign currency, it is unfortunate to note that its child sex tourist trade is also on the increase. Reports show that sex tours are as easily organised as wine route tours in Cape Town. Commercial sexual exploitation of children is prevalent in South Africa and has become more organised in recent years. A comprehensive response to the problem is essential to ensure that South Africa does not become a "safe haven" for child sex tourists. Effective laws at home and the extraterritorial application of these laws to prosecute South African nationals for crimes committed abroad are imperative.

Significant steps are being taken both nationally and internationally to target child sex tourism. South Africa has ratified several international instruments on children's rights, trafficking in persons, child labour, and discrimination against women and young girls, all of which relate to child sex tourism. In doing so, South Africa has made an international commitment to uphold the provisions of these instruments and give effect to them. South Africa is therefore under an international obligation to create the necessary structures and apply mechanisms and resources to combat child sex tourism.

South Africa does not have legislation that specifically prohibits child sex tourism at present. The Sexual Offences Act and common law, however, cover a wide range of offences relating to sexual intercourse and sexually indecent acts as well as the various facets of prostitution such as solicitation, procurement of females as prostitutes and brothel-keeping. Although these legal measures are in many respects commendable there are still too many loopholes. There are situations that are not adequately provided for and others that are not provided for at all. It is expected that the new Sexual Offences Bill containing specific provisions on child sex tourism couched in gender-neutral terms which apply extraterritorially, will go a long way to improving the present system for child victims.

The issue of child protection is covered by South Africa's Constitution as well the provisions of the Child Care Act and Domestic Violence Act. These legal measures ensure that the direct involvement in the commercial exploitation of children is prohibited, the conduct of parents who ill-treat or allow their child to be ill-treated is covered and the abduction or removal of a child is an offence. Despite these positive aspects, there is nevertheless room for improvement. The legislative provisions of the Children's Act, which has been assented to by the President but not yet promulgated, comprehensively address the problem areas. Once enforced the Children's Act will go a long way in improving the present system of child protection by holistically addressing the needs of children in respect of prevention of abuse as well as their care and protection.

Other pieces of legislation which apply to child sex tourism are the Prevention of Organised Crime Act; Immigration Act; Basic Conditions of Employment Act; Films and Publications Act and the Electronic Communications and Transactions Act. They allow for the prosecution of sex exploiters and traffickers for offences related to child sex tourism, child prostitution, child pornography and various other forms of sexual exploitation of children. Overall the impact of these miscellaneous pieces of legislation on child sex tourism is praiseworthy. However, they bring to light the fact that there are numerous statutes, each dealing with one aspect of child sex tourism as opposed to a single comprehensive statute to refer to in handling such cases. Therefore there is still room for improvement in this regard.

CHAPTER 1

INTRODUCTION

1. GENERAL

An understanding of the nature and scope of child sex tourism is essential for the purpose of making an effective response to it. This chapter therefore consists of an explanation of the problem and how it has impacted on South Africa.

It will set out the causes and effects of child sex tourism, the purpose of researching the topic and what will hopefully be achieved through the research. It will also contain a structure of how the various issues will be dealt with in the remainder of the dissertation.

2. WHAT IS CHILD SEX TOURISM?

The United Nations defines child sex tourism as “tourism organized with the primary purpose of facilitating the effecting of a commercial sexual relationship with a child”.¹ Child sex tourism may also involve the opportunistic exploitation of prostituted children while travelling on business or for other reasons.²

The sex tourism industry is one which balances “the supply of and the demand for sexual services and involves a segment of the local sex industry”³ which is directly connected to an international and domestic tourist market. The expansion of global tourism has brought with it

¹ *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, United Nations Economic and Social Council, Commission on Human Rights, 52d Sess., Agenda Item 20, U.N. Doc. E/CN.4/1996/100 (1996).

² Klain (of the American Bar Association Center on Children and the Law) for the National Center for Missing & Exploited Children *Prostitution of Children and Child-sex tourism: An Analysis of Domestic and International Responses* (April 1999) 32.

³ Hodgson “Sex Tourism and Child Prostitution in Asia: Legal responses and Strategies” 1994 *Melbourne University Law Review* 512 517.

complications in that tourism has become the “vehicle” for sex tourists to instigate contact with child sex workers.⁴

A portion of child sex tourists travel to other countries for the purpose of engaging in sexual activities with children, many of them believing that such activities are both legally and culturally acceptable in destination countries.⁵ They travel to countries where sexual abuse laws are lenient and poorly enforced and prostituted children are plentiful.⁶ Very often, these tourists see children from third world countries as inferior and use this to justify their actions. They view the women and children they exploit as an entirely different class of human beings,⁷ hence their indifference and ignorance towards the harmful consequences suffered by their victims.⁸

Other child sex tourists are domestic tourists engaging in sexual activities with children in their own home countries. Many child sex tourists are affluent, highly respected professional people from trusted and prominent backgrounds.⁹ Some child sex tourists are paedophiles who preferentially seek out children for sexual relationships, but many are “situational abusers”, who only engage in sexual acts with children when the opportunity presents itself.¹⁰

Child sex tourism is not limited to particular areas on the globe.¹¹ However developing countries are the most popular destinations for sex tourists. A United Nations Working Group on Contemporary Forms of Slavery has recognised the connection between mass tourism and an increase in child prostitution.¹² Tourism is not the cause of child sexual exploitation,

⁴ Smallberger *The extent and impact of sex tourism* in certain metropolitan areas (1999) 106; Snell “Commercial Sexual Exploitation of Youth in South Africa” 2003 *The Journal of Negro Education* 506.

⁵ Preda Foundation Inc. “Success in battle against sex tourism” at <http://www.preda.org/research/r010211003.html> (Date accessed: 21/02/03).

⁶ Hechler “Don’t! Buy! Thai!- Child Sex Tourism” at <http://www.geocities.com/CapitolHill/Senate/8931/dbt-rep.htm> (Date accessed: 21/02/03).

⁷ O’Connell Davidson *The Sex Exploiter*, World Congress Against the Sexual Exploitation of Children, Stockholm, Sweden (August 27-31, 1996) 6.

⁸ Klain n 2 page 38.

⁹ Hodgson n 3 page 515.

¹⁰ Alexander *Realities and Responsibilities: Tourists and the Sex Industry in Cape Town, SA*, a Paper presented by SWEAT (October 2001).

¹¹ Eriksson “Co-operation an Imperative for Success” contained in ECPAT *Enforcing the Law Against the Commercial Sexual Exploitation of Children*, a Report of the International Consultation held at Rama Gardens Hotel, Bangkok, Thailand, January 17-19, 1996 as part of the preparation for the World Congress Against Commercial Sexual Exploitation of Children to be held in Stockholm, Sweden (August 1996)

¹² SALC *Report on Sexual Offences: the substantive law* Project 107 (12 August 1999) 71; Munir & Yasin “Commercial Sexual Exploitation” 1997 *Child Abuse Review* 147 149.

however, sex tourists make use of the facilities provided by the tourism industry, such as the hotels, bars and nightclubs in carrying out their exploitative conduct.¹³

Sex tours are in most cases arranged informally amongst friends or colleagues.¹⁴ However, there have been cases of tour operators discreetly enticing tourists with child sex by advertising their matchmaking services.¹⁵ There have also been cases of travel agents being prosecuted for supplying and arranging sex tours.¹⁶ There are still numerous small travel companies that promote child sex tourism by identifying resorts where child prostitution is prevalent. These companies are often too small to draw the attention of law enforcement officials.¹⁷

It is believed that an estimated 1 million children across the globe enter into the illegal sex trade each year.¹⁸ Child sex tourism is a global phenomenon that requires local and global solutions. The attempts made to combat child sex tourism have thus far been inadequate. A well co-ordinated local and global effort in this regard is essential.¹⁹

3. CAUSES

There are a number of social and economic factors leading to child sex tourism.²⁰ A proper understanding of the causes of the problem is essential in attempting to eradicate it.

Poverty is one of the root causes of child sex tourism.²¹ It leads to a lack of education, a lack of marketable skills and therefore a shortage of employment opportunities, leaving children

¹³ Merten "Sex tourism conference fails to draw officials" 19-25 October 2001 *Mail & Guardian*.

¹⁴ ECPAT UK "Child Sex Tourism" at <http://www.ecpat.org.uk> (Date accessed: 26/10/05).

¹⁵ Warm Blankets "History of Trafficking in South East Asia" at <http://www.traffickinginpersons.com> (Date accessed: 26/08/05).

¹⁶ ECPAT UK "Child Sex Tourism" at <http://www.ecpat.org.uk> (Date accessed: 26/10/05).

¹⁷ National Center for Missing and Exploited Children "What is Sex Tourism of Children?" at <http://www.missingkids.com> (Date accessed 27/10/05).

¹⁸ Jackson "Children's Rights World Congress" 2005 *UN Chronicle* 35 35.

¹⁹ UNICEF "Sexual exploitation: destroying the lives of millions of children" 1995 *Salus* 14 14.

²⁰ ECPAT "Opening Address: ECPAT International's regional consultation on the trafficking and sexual exploitation of children in Southern Africa, Johannesburg, March 3-6 2002" at <http://www.socdev.gov.za/Statements/2002/March/ecpat.htm> (Date accessed: 26/02/03).

²¹ Healy "Prosecuting child sex tourists at home: Do laws in Sweden, Australia and the United States safeguard the rights of children as mandated by International Law" 1995 *Fordham International Law Journal* 1852 1869; Hodgson note 3 page 516; United States Embassy "World congress against commercial sexual exploitation of children" at <http://www.usis.usemb.se/children/csec/backgrounder1.html> (Date accessed 21/02/03).

with very little choice but to turn to prostitution.²² Many nations with thriving sex tourism industries are suffering from widespread poverty.²³ Children are more likely to be at risk of being lured into the sex trade in countries where there are huge disparities between wealthy and poor and unequal distribution of social services.²⁴ Children in poor families are easy targets for procurement agents. They are lured away from their troubled homes by "recruiters" with promises of jobs in a city and are then forced into prostitution instead.²⁵ Poverty creates circumstances which increase the vulnerability of children to sexual exploitation by adults.²⁶

Linked to poverty, is life on the streets. Many children run away from home to escape the dire circumstances of their home life. They engage in prostitution as a result of the loneliness and emotional vulnerability experienced on the streets.²⁷ These children often lack the necessary street sense to survive on their own and engage in "survival sex", or in the exchange of sex for resources such as food, shelter and protection.²⁸

It is unfortunate that children are often forced into the sex trade with the full knowledge of their parents. Children are handed over to procurement agents in exchange for a loan of money, with the child having to work as a prostitute until the loan is paid off.²⁹ Tourism also brings consumerism to many parts of the world to which luxury products and services were formerly unavailable.³⁰

In this regard, Healy makes reference to "materialism and consumerism," the offering of large financial rewards, luxuries and comforts to parents by pimps and agents in exchange for their daughters.³¹ The following account of the life of Tan, a fourteen year old Thai girl, depicts what abject poverty can result in for the child victims:

"Tan works as a dancer in a bar in Pat Pong which is the centre of the sex tourist industry in Bangkok. Tan has to dance half-naked on the bar. She also has to have sex

²² Hodgson n 3 page 517.

²³ US Department of Justice "Sex tourism" at <http://www.usdoj.gov/criminal/ceos/sextour.html> (Date accessed: 26/10/05).

²⁴ ECPAT n 20 page 2.

²⁵ US Department of Justice n 23.

²⁶ Van Vuuren "South African Children for Sale" 2000 *New Agenda* 15 15.

²⁷ Klain n 2 page 2.

²⁸ Whitcomb, De Vos & Smith for Education Development Center, Inc., & ABA Center on Children and the Law *Program to Increase Understanding of Child Sexual Exploitation, Final Report* (1998) 3.

²⁹ Hodgson n 3 page 519.

³⁰ National Center for Missing and Exploited Children n 17 page3.

³¹ Healy n 21 page 1869.

*with tourist men if they select her. Tan was sold to an agent when she was only ten. For two years she cleared ashtrays and glasses in the bar until she was finally sold to a tourist who purchased her virginity. Since then Tan has had sex with many tourists and locals every night. She hates what she has to do as she has been beaten and abused often. But she cannot escape this life as it is her duty to honour her parent's debt and she has been threatened with violence if she tries to leave. Tan sends most of her money to her parents to take care of her brothers, sisters and grandparents - she believes it is her destiny.”*³²

Gender bias increases the vulnerability of the girl child to sexual exploitation.³³ Although sexual exploitation affects both boys and girls, young teenage girls constitute the majority of victims in child sex tourism.³⁴ Cultural practices exist which discriminate against women and girls, for example where boys are given priority when it comes to access to education, thereby increasing the girl child's risk of becoming involved in prostitution to earn an income.³⁵ Religious practices exist which foster the image of girls as sexual objects thereby encouraging their subordinate status. These discriminatory practices further aggravate the situation for the girl child.³⁶ Overall, the socialisation of girl children to accept an inferior position negatively impacts on their potential for development and has devastating repercussions.³⁷

Additionally, misconceptions surrounding HIV–AIDS³⁸ are a leading cause of child sex tourism. Children are sought after as sex partners under the mistaken belief that they are less likely to be HIV positive or that sexual intercourse with a virgin is a cure for HIV.³⁹ As Aids continues on its rampage, increasing the number of child-headed households, more children (usually the eldest girl child) turn to prostitution as the only way in which to provide the basic necessities for their families.⁴⁰

³² ECPAT, Australia, *Educational Appeal* 1994 (leaflet); see Hodgson n 3 page 520.

³³ Preda Foundation Inc. “UNICEF: Child sex trafficking must end” at <http://www.preda.org/research/r00012303.html> (Date accessed: 21/02/03). In many countries female children are not given equal access to education leaving them with limited employment opportunities. See Healy n 21 page 1872.

³⁴ Jeffreys “Globalizing sexual exploitation: sex tourism and the traffic in women” 1999 *Leisure Studies* 179 191.

³⁵ ECPAT n 20 page 2.

³⁶ TED Case Studies “Nepal sex trade” at <http://www.american.edu/projects/mandala/TED/nepalsex.htm> (Date accessed: 27/10/05).

³⁷ Kaime “The Convention on the Rights of the Child and the cultural legitimacy of Children's Rights in Africa: Some Reflections” 2005 *African Human Rights Law Journal* 221 229.

³⁸ Healy n 21 page 1873; UNICEF n 19 page 14; see Hodgson n 3 page 520; UCBS's SexInfo “Sex tourism” at <http://www.soc.ucsb.edu/sexinfo/?article=violence&refid=018> (Date accessed: 24/04/03).

³⁹ Schlagenhauf “Unicef report documents sexual exploitation of children” 8 November 2003 *The Lancet* 1556 1556; The Namibian “SA's child sex shame revealed” at <http://www.namibian.com.na/netstories/2000/August/africa/009CD4F0E0.html> (Date accessed 21/02/03).

⁴⁰ Smith “Sex tourism begins in SA” 12-18 October 2001 *Mail & Guardian*.

Furthermore, the dramatic increase in the use of the Internet⁴¹ has resulted in it becoming a convenient marketing tool for organised sex tours, thereby contributing to the expansion of the child-sex industry.⁴² The Internet is used to find the locations where children are available for prostitution.⁴³ Some Internet chatrooms, online message boards, and online organisations go as far as to provide detailed instructions on how to go about procuring child prostitutes.⁴⁴ Travel agents for child sex tours publish their brochures and guides that cater for child sex tourists on the Internet. Easy access to this information generates interest in child sex tourism and assists child sex abusers in making their travel plans. The use of the Internet to transfer child pornography has also contributed to the growth of the sex trade.⁴⁵ Child pornography is often employed to “normalise” sexual behaviour to the child.⁴⁶

Poor law enforcement is also to blame. Local authorities often hesitate to enforce child protection laws, especially against foreigners. Many countries that are struggling economically have become increasingly tourist-oriented to create profitable sources of income.⁴⁷ The lure of the tourist dollar is so great, it often convinces law enforcement officials to turn a blind eye to the issue.⁴⁸ Police officials in some countries have been implicated in child prostitution rings and have even operated as guards at brothels providing child sex.⁴⁹

The underlying causes of the issue are multifaceted. These socio-economic issues need to be addressed before a substantive solution can be found. In order to eradicate child sex tourism, the above root causes require urgent attention.

⁴¹ Spies (ed) *Sexual Abuse: Dynamics, assessment & healing* (2006) 23.

⁴² Web sites on the internet provide the means to sell sex-tour packages on line complete with directions to local brothels to an international market. There are more than 100 sites in Asia alone, promoting the commercial sexual exploitation of teenagers. For an average fee of \$100- \$150, members of such sites can tap into extensive information on specific locations of the sex industry. See UCBS’s SexInfo n 37; Swindell for the Free our Women Campaign: “Child sex trafficking on Rise in Africa” at <http://www.midsnottsol.org/fow/r004.html> (Date accessed: 21/02/03); ECPAT n 20.

⁴³ TED Case Studies n 36.

⁴⁴ National Center for Missing and Exploited Children n 17.

⁴⁵ US Department of Justice n 23.

⁴⁶ Conradie “The structure and function of child pornography” at http://www.cyberpatrol.com/resources/online_lingo.aspx (Date accessed: 30 August 2004).

⁴⁷ US Department of Justice n 23.

⁴⁸ UNICEF n 19 pages 14-15; Hodgson n 3 page 518; Child sex tourism has been promoted in the Philippines because of its profitability. See Jeffreys n 34 page 179.

⁴⁹ Hodgson n 3 page 518.

4. CONSEQUENCES

The effects of child sex tourism on the lives of children are “profound and permanent”.⁵⁰ Children involved in child sex tourism are exposed to immediate harm, irreversible damage and even death.⁵¹ Children suffer severe setbacks as far as their physical, sexual and emotional development is concerned. They are left with low self-esteem, a loss of dignity and shattered confidence as a result of the physical and emotional abuse encountered.⁵² Child prostitutes suffer from depression and feelings of hopelessness. They live in constant fear of being beaten by pimps who control the sex trade and of being subjected to sadistic acts by clients.⁵³

The child prostitutes are exposed to rape, murder, drug abuse, high-risk pregnancies, sexually transmitted diseases, including HIV,⁵⁴ all of which, in turn, affect not only the physical and psychological well-being of the child, but have devastating effects on society at large. Almost all victims of child sex tourism experience rejection by their families and communities in addition to fear, shame and despair.⁵⁵

Consequently, child sex tourism is a phenomenon which “decimates the population, changes family structure and reverses any developmental gains made”.⁵⁶ It is a phenomenon which prevents children from leading the “productive, rewarding and dignified lives” to which they are entitled.⁵⁷

⁵⁰ Preda Foundation Inc. n 33.

⁵¹ Barnitz “Effectively Responding to the Commercial Exploitation of Children: A Comprehensive approach to prevention, protection, and reintegration services” 2001 *Child Welfare* 597 600.

⁵² Anon “Children as a saleable commodity” 22-29 December 2001 *The Lancet* 2095 2095; Preda Foundation Inc. n 33; Healy n 21 page 1837.

⁵³ US Department of Justice n 23.

⁵⁴ Saunders “Sexual Trafficking and Forced Prostitution of Children” (a presentation at a Journalists Seminar, New York City, 29 October 1998) at <http://www.walnet.org/csis/papers/saunders-childpro.html>.

⁵⁵ World Vision “Child sex tourism prevention” at http://www.domino201.worldvision/wvuswfo.nsf/stable/globalissues_stp (Date accessed: 16/10/05).

⁵⁶ Vall “Denial won't make sex tourism go away, told conference” 17 October 2001 *Cape Argus* at <http://allafrica.com/stories/printable/200110170046.html> (Date accessed: 22/10/01).

⁵⁷ Draft Declaration and Agenda for Action (as discussed on pg 31 of the dissertation); Klain n 2 page 35.

5. THE EXTENT OF THE PROBLEM IN SOUTH AFRICA

As South Africa's tourism industry expands into one of the country's top earners of foreign currency,⁵⁸ it is unfortunate to note that its child sex tourist trade is also on the increase.⁵⁹ Reports indicate that sex tours are as easily organised as wine route tours in Cape Town,⁶⁰ with children as young as four years old being offered as commodities.⁶¹ According to Sheryl Ozinsky, Cape Town tourism manager, the high levels of prostitution in South Africa are "fuelled by deepening poverty, collapsing social services and lack of employment".⁶²

Commercial sexual exploitation of children is a widespread problem in South Africa and has become more organised in recent years. Children in the country are sexually exploited in various ways.⁶³ Despite the unavailability of statistical data on the exact number of children involved in the sex industry in South Africa,⁶⁴ research shows that the child sex industry is definitely a "growing phenomenon".⁶⁵

Studies indicate that in South Africa, one girl in every three is a victim of sexual abuse⁶⁶ and approximately 28 000 children are exposed to commercial sexual exploitation in this country.⁶⁷ Reports indicate that children across the country are providing sexual services for as little as R20 to feed their families. Approximately 68% of tourism in South Africa is domestic and an estimated 90% to 95% of those who pay for child sex are South African. The

⁵⁸ Country Information: South Africa at http://www.childhood.com/en/text_p425.html (Date accessed: 7/04/03); Follentine *Sexual Exploitation of Children: A Response by the Department of Social Services: Western Cape* 16 October 2001 4; Merten n 13.

⁵⁹ Media and Gender Monitor "Cape Fearless: 'Ilita labantu fighting women and child abuse'" at <http://www.wacc.org.uk/publications/mgm/03/ilita.htm> (Date accessed: 21/02/03).

⁶⁰ The Namibian "SA's child sex shame revealed" at <http://www.com.na/netstories/2000/August/africa/009CD4F0E0.html> (Date accessed 21/02/03); Peterson *Key note address title Child Sexual Exploitation is an Open Secret, Sex Tourism "Myth or Reality"* Conference, 16 October 2001.

⁶¹ Preda Foundation Inc. "South African child sex industry growing rapidly" 1 at <http://www.preda.org/research/r00120705.html> (Date accessed: 21/02/03)

⁶² Ozinsky *Marketing: Responding to the Demands of Tourists* 17 October 2001 7; Merten n 13.

⁶³ ECPAT "Evaluation of South Africa" at <http://www.ecpat.net> (Date Accessed 1/09/05).

⁶⁴ One of the biggest challenges facing researchers on this issue in developing countries is the absence of accurate statistical data indicating the incidence of child prostitution and data to establish the precise identity of those who exploit them.

⁶⁵ Smallberger n 4 page 91.

⁶⁶ South African Press Association, Johannesburg "Almost one Third of SA Children Abused-SAHRC" April 23, 2002 at <http://allafrica.com/stories/200204240007.html> (Date accessed 7/05/03). According to this same report, it is estimated that 20 percent of females and 13 percent of males are abused yearly.

⁶⁷ Country Information: South Africa n 58.

perpetrator is therefore often one of our own.⁶⁸ Sexual activity has proved to be a tourist attracting force and the problem is one that the government and the tourism industry need to curb.⁶⁹

One of the most serious problems confronting South Africa is the high level of unemployment, particularly amongst the previously disadvantaged population groups. A vast number of children live in communities which are excluded from South Africa's free market economy, where more than half the adult population is unemployed. Those who are employed are earning below subsistence wages and are often living on the streets.⁷⁰

A study conducted by UNICEF indicated that approximately 180,000 children had lost one or both parents through HIV/AIDS related deaths by 1999, leaving a vast number of children having to fend for themselves financially. This number was projected to increase to 1 million by the end of 2005. A study carried out by the Khayeletu Health Centre in Diepsloot community, an informal settlement in the north of Johannesburg, revealed that one in every five girls is HIV positive; 40% of the girls under the age of 16 are involved in commercial sexual exploitation; the unemployment rate in the community exceeds 50% and child prostitution in the area takes the form of survival sexual exploitation.⁷¹

Child prostitution is noted to be a serious problem and one which is escalating at an alarming rate in South Africa. Death and prostitution are both on the increase in the country and there is a correlation between the two.⁷² It is estimated that approximately 15 new girls between the age of 15 and 18 are arrested for prostitution every month. It is estimated that 25% of Cape Town's street children are engaged in prostitution. The Network Against Child Labour estimates that 400 000 children are engaged in child labour and some of these children are forced or sold into prostitution in different parts of South Africa.⁷³

Alarmingly, there are at least 32 brothels and hotels in Johannesburg in Hillbrow, Berea and Joubert Park where young girls engage in prostitution and there are approximately 5000 girls

⁶⁸ Laschinger "Sex in the (Mother) City" 25 February 2004 *Finance Week* 13.

⁶⁹ Smallberger n 4 page 15.

⁷⁰ ECPAT n 63.

⁷¹ *Ibid.*

⁷² Smith n 40.

⁷³ ECPAT n 63.

operating in these areas. According to reports by Durban Children's Society, child prostitution in the Point area is particularly rife.

In areas in Durban central like The Wheel and The Workshop, young prostitutes are sent out to recruit other young girls. Prostitution rings are reported to be operating in Kwa-Zulu Natal schools where groups of girls between the ages of 11 and 16 years frequent discos to prostitute themselves. Many of the child prostitutes working for pimps, give all their earnings to the pimps in exchange for drugs. They are involved in prostitution for survival.⁷⁴

Another disturbing factor is that many children are trafficked into the sex trade. South Africa is a well-established destination and transit point for trafficking in children for sexual purposes. Research conducted by Molo Songololo⁷⁵ details how children are kidnapped and trafficked for commercial sexual purposes within and across South African borders.⁷⁶ Children from other countries such as Thailand and China are trafficked into South Africa and sold into sexual slavery by criminal gangs from these countries.

Within South African borders girls between the ages of four and 17 are the primary targets for trafficking. Children from rural areas in the main towns of Durban, Cape Town and Johannesburg are tricked and forced into prostitution by way of the advertisement of employment opportunities in newspapers.⁷⁷ With transportation and accommodation costs paid in advance, the child victims find themselves in debt bondage and forced into prostitution for the repayment of the debt.⁷⁸

Reports indicate that many teenagers are involved in prostitution on trucking routes.⁷⁹ Teenage girls are also used by taxi drivers, gangsters and parents to provide sexual services to men in hotels, on the streets and at private clubs and homes. It is estimated that the phenomenon of commercial sexual exploitation of children affects a huge number of children, both girls and boys but girls constitute the majority of victims.⁸⁰

⁷⁴ *Ibid.*

⁷⁵ A South African NGO.

⁷⁶ Molo Songololo *The Trafficking of Children for the Purposes of Sexual Exploitation* (2000).

⁷⁷ ECPAT n 63.

⁷⁸ Anon "Quick hits: Sex in the News: South Africa a haven for sex tourists" May 2003 *Contemporary Sexuality* 8 8 (based on a reports in the *Sunday Mirror* on 30 March 2003 and the *Financial Times* on 24 March 2003).

⁷⁹ Smith n 40.

⁸⁰ ECPAT n 63.

The South African Human Rights Commission is particularly concerned about the exploitation and abuse of child sex workers in Beaufort West. Research conducted by the SAHRC has revealed that sex work in Beaufort West resembles an “organized social system” in that it is integrated into the lives of the community as a means to survive. Beaufort West has a significant mobile client base because of passing truckers and, when coupled with acute deprivation and poverty, this creates fertile ground for the exploitation of sex workers, in particular, underage sex.⁸¹

6. A CHILD SEX TOURISM CASE IN SA

Numerous articles published by the South African media have brought to the public’s attention, the poor handling of the Zimmerman “sex tourist” case,⁸² which occurred within the South African borders.⁸³ The case involved Peter Zimmerman, a 46 year old Swiss tourist, who was caught having sex with a 14 year old boy from Alexandra in his Johannesburg hotel room on 8 October 2005.⁸⁴

Police became suspicious of Zimmerman after receiving a tip-off from a member of the public.⁸⁵ Surveillance footage at the hotel revealed that he had been taking young boys up to his room. He was later caught “in the act” with a 14 year old boy in his hotel room and arrested there by the Family Violence, Child Protection and Sexual Offences Investigating Unit.⁸⁶ Zimmerman was arrested on suspicion of contravening section 14 of the Sexual

⁸¹ SAHRC “SAHRC Calls for Action on Child Sex Work” at <http://www.sahrc.org.za/sahrc/cms/publish/article136.shtml>. (Date accessed: 14/09/05).

⁸² This case will be used as an example throughout the dissertation.

⁸³ Davids “Small change for child molester” 4 December 2005 *Sunday Times*; Roper “Sex with kids 'a bargain' in SA” 30 November 2005, 08:53, at <http://www.news24.com>; Sapa “Swiss man arrested for sexually abusing boy (14)” 09 October 2005, 15:45 at <http://www.sabcnews.com>; Sapa “Swiss man stays in jail after alleged sex crime” 17 October 2005, 19:45 at <http://www.sabcnews.com>; Molwedi “Swiss sex tourist 'traumatised' by case, court told” 30 November 2005 *Cape Times*.

⁸⁴ Davids n 83.

⁸⁵ Sapa “Swiss ‘sex tourist’ caught in the act” 10 October 2005 at <http://www.iafrica.com/news/sa>. (Date accessed: 27/01/06).

⁸⁶ Sapa “‘Sex tourist’ fined, released” 29 November 2005 at <http://www.iafrica.com/news/sa>. (Date accessed :27/01/06).

Offences Act⁸⁷ as well as section 50(A) of the Child Care Act,⁸⁸ dealing with sexual encounters with underage persons and the commercial exploitation of children respectively.⁸⁹

After the arrest, Superintendent Mary Martins-Engelbrecht made the following statement to the media: “Sex tourism or commercial exploitation of children has become a world-wide phenomenon. We trust that this arrest will serve as a stern warning to foreigners that this sick industry will not be tolerated in this country.”⁹⁰ However, the handling of the case was far from stern.

In the Wynberg Magistrate Court on 18 November 2005, Zimmerman pleaded guilty to a charge of indecent assault, after striking a plea bargain agreement⁹¹ with the state. Reports indicate that Zimmerman admitted only to “masturbating” the boy in his hotel room and promised the court that he would never do it again. The Court imposed a sentence of a fine of R 10 000 or 12 months imprisonment.⁹²

According to the plea bargain agreement, when it came to passing sentence the court ought to consider numerous factors, such as the fact that Zimmerman had pleaded guilty, he was a first offender, and even though he was not married, Zimmerman had been with a life partner for the duration of ten years. There was even an assertion in the agreement that the case had put a strain on Zimmerman. The agreement read that “[h]e has become traumatised as a result of his involvement and this has necessitated his seeking psychological help. The matter has deeply traumatised him and he is filled with remorse for what he has done.”⁹³

As a result, Zimmerman paid the fine and has since left South Africa and has apparently gone into hiding. Although he does face a possible prosecution in his home country, Swiss

⁸⁷ To be dealt with in chapter 3, par 2.

⁸⁸ To be dealt with in chapter 4, par 4.

⁸⁹ Sapa “Swiss ‘sex tourist’ nabbed in Sandton at <http://www.mg.co.za/article> (Mail & Guardian Online) (Date accessed 27/01/2006).

⁹⁰ Sapa n 85; Sapa n 89.

⁹¹ S 105 A of the Criminal Procedure Act 51 of 1977 sets out a plea bargain agreement procedure. In terms of this provision, negotiated agreements between the prosecution and defence with regard to plea and sentence can be reached as long as certain formal requirements are met. This is part of accepted practice in South Africa.

⁹² Molwedi n 83.

⁹³ *Ibid.*

authorities will first need to verify the boy's age to ascertain whether or not he is below the age of consent in Switzerland in order for this to happen.⁹⁴

It is alleged that during his one week holiday in the country, Zimmerman, a corporate lawyer, solicited three boys to have sex with him. Although all three boys were questioned, he was only caught with one of them. He apparently spent between R 8000 and R 10 000 on gifts for his victims at the Sandton City shopping centre. According to the police officer who worked on the case, it is all too easy for someone from Switzerland to pay this amount for gifts in order to lure South African children into having sex with them.⁹⁵

The fine of R 10 000 for having sex with a minor seems extremely inappropriate and has been met with outrage by the media, NGO's and children's rights organisations who have described the fine as a "slap on the wrist".⁹⁶ Complaints have been made that Zimmerman spent more money on his hotel room and on gifts to lure the children than on the fine he eventually paid.⁹⁷ The case has received international media attention. Elvina Quaison of the UK charity, Africans Unite Against Child Abuse (AFRUCA) is quoted as saying:

*"We believe this sends the wrong message that it is right for paedophiles to go to other countries, especially third world, African countries to exploit and abuse poor, underprivileged children. The Judgement gives credence to child sexual exploitation and abuse by rich, foreign tourists and will encourage potential abusers to see South Africa as a safe haven for paedophiles."*⁹⁸

In response to the outrage, a source close to the case said the state had entered into a plea bargain agreement because the victim was back on the streets and it would be very difficult to trace him and have him testify in court. The NPA was left with two options, either to agree to a plea bargain or withdraw the charges. Zimmerman pleaded guilty to the charge of indecent assault "notwithstanding the fact that the boy could not be found to support the charge".⁹⁹

⁹⁴ An update on the case in *The Star*, a South African newspaper, has revealed that Zimmerman could possibly find himself back in court facing a civil claim. The Director of Public Prosecutions for Johannesburg, Advocate Kevin Attwell, is reported to have ordered the return of the case docket to his office for further investigation. The NPA, however, refused to comment on what action would be taken next. See Makgalemele, Badat & Ajam "Sex tourist facing a civil claim" 28 January 2006 *The Star*.

⁹⁵ Davids n 83.

⁹⁶ Sapa n 86.

⁹⁷ Davids n 83.

⁹⁸ Roberts "Swiss 'sex tourist' walks away with fine for South Africa child rape" at <http://www.Blackbritain.co.uk/news/details> (Date accessed: 27/01/2006).

⁹⁹ Motloutng "NPA defends 'sex tourist' plea bargain" 30 November 2005, 01:14 at <http://www.mg.co.za> (i.e Mail & Guardian Online) (Date accessed 27/01/06).

Opting for a plea bargain and securing a conviction, albeit for a small fine, would be better than taking the matter to trial where the likelihood of success was improbable. The state had to do what was “reasonable” under the circumstances.¹⁰⁰

On a positive note, the NPA has pointed out the fact that the case has been widely reported in the Swiss media and has tarnished Zimmerman's reputation. As a convicted sex tourist, he will never be allowed back into South Africa. Zimmerman's name has apparently been handed over to Interpol and member countries will be informed of Zimmerman's offence and his tendencies. The NPA's statement continued to say that, although they would have preferred a much harsher sentence for Zimmerman, they believe that the sentence imposed was the best result under the circumstances.¹⁰¹

As to the behaviour of the child victim, reports indicate that the 14 year hold was uncooperative with police and even defended Zimmerman to them. According to Miranda Friedman, director of Women and Men Against Child Abuse, it is not uncommon for children who live in dire poverty to protect their source of income in this way. The boy is unfortunately back on the streets. He ran away before psychological counselling could be arranged for him.¹⁰²

Despite the noteworthy efforts made by South Africa in ratifying international treaties, enacting legislation and adopting programmes of action which better protect children from sexual exploitation, the handling of the case in practice reveals something entirely different. Without specific legislative provisions dealing with child sex tourism and imposing harsh sentences for it, cases may continue to be prosecuted in this manner.

In order to eradicate incidences of child sex tourism such as this, the South African government needs:

- effective laws and enforcement mechanisms at home;
- extraterritorial legislation to prosecute its nationals for crimes committed abroad;
- the co-operation and participation of the tourism industry and NGO's;

¹⁰⁰ Molwedi n 83.

¹⁰¹ Motloun g n 99.

¹⁰² Davids n 83.

- the mechanisms to co-operate with relevant agencies abroad and
- the implementation of programs to eradicate the root causes of the problem.

Without this South Africa could end up being a “safe haven”¹⁰³ for child sex tourists. Any delay in responding to the issue will cost the country dearly.¹⁰⁴

7. PURPOSE OF THE DISSERTATION

The purpose of this dissertation therefore is:

- To make an assessment of the law as it is.
- To highlight the inadequacies of the law as it is.
- To set out South Africa's legal response to the issue.
- To make recommendations to the South African government on more effective legislative measures to protect children from this problem.

8. STRUCTURE OF THE DISSERTATION

This dissertation will address the issue of child sex tourism from four different perspectives, each of which will be contained in a separate chapter. A breakdown of each chapter is set out below.

8.1 CHAPTER 2: INTERNATIONAL LAW PERTAINING TO CHILD SEX TOURISM

South Africa has certain international obligations with regard to protecting children from child sex tourism.¹⁰⁵ The first area of focus for this dissertation will therefore be on child sex tourism from an international perspective. This chapter will focus on South Africa's international obligations through customary international law and the various treaties to which it has become a party. It will clarify the place of these international obligations in South

¹⁰³ Swindell n 42.

¹⁰⁴ Vall n 56; According to Charlene Smith, reporter for the Mail & Guardian, the South African government does too little to uphold the constitutional protections of children or to fight poverty that is claims fuels Aids. See Smith n 40.

¹⁰⁵ See an overview of these obligations in South African Human Rights Commission (SAHRC) *Report on Sexual offences against Children: Does the Criminal Justice System Protect Children?* (April 2002) 10.

African municipal law and assess their effectiveness in protecting children from child sex tourism. Mainly, this chapter places the discussion of child sex tourism in South African law in its international context.

8.2 CHAPTER 3: CHILD SEX TOURISM AS A SEXUAL OFFENCE

A number of statutes and common law offences facilitate the practical implementation of the South Africa's international obligations with regard to child sex tourism. For the purposes of this dissertation these statutes and common law offences will be divided into three categories, namely: sexual offences laws; child protection laws and other miscellaneous laws. Chapter 3 focuses on child sex tourism as a sexual offence. It will delve into South Africa's current Sexual Offences Act¹⁰⁶ and common law offences and assess the effectiveness of the law as it is. It will also deal with the impending sexual offences legislation containing specific provisions on child sex tourism, namely the Sexual Offences Bill.¹⁰⁷ The provisions of the Bill and their effectiveness in cases of child sex tourism will be explored.

8.3 CHAPTER 4: CHILD PROTECTION LAWS PERTAINING TO CHILD SEX TOURISM

This chapter delves into the substantive law from a child protection perspective. It covers the Children's Charter, South Africa's constitutional provisions on the protection of children as well the provisions of the Child Care Act¹⁰⁸ and the Domestic Violence Act.¹⁰⁹ It also deals with the background to the new Children's Act,¹¹⁰ the effectiveness of its provisions and how they improve on currently enforceable legislation in relation to protecting children from sex tourism.

¹⁰⁶ Act 23 of 1957.

¹⁰⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Bill B-2006.

¹⁰⁸ Act 74 of 1983.

¹⁰⁹ Act 116 of 1998.

¹¹⁰ Act 38 of 2005.

8.4 CHAPTER 5: OTHER ISSUES RELATED TO CHILD SEX TOURISM

Aside from the two main categories of sexual offences legislation and child care legislation, there are other miscellaneous pieces of legislation which also relate to child sex tourism, such as the Prevention of Organised Crime Act;¹¹¹ Immigration Act;¹¹² Basic Conditions of Employment Act;¹¹³ Films and Publications Act¹¹⁴ and the Electronic Communications and Transactions Act.¹¹⁵ The applicability of these Acts to child sex tourism and their effectiveness will be discussed in this chapter.

8.5 CHAPTER 6: CONCLUSION

This chapter contains a summation of the conclusions reached on the various issues dealt with in the dissertation as well as recommendations on how these issues should be handled in future by the South African government.

9. CONCLUSION

The growth of the global child-sex trade, including child sex tourism and child trafficking for sexual purposes has in recent times gained increased attention and deserved outrage.¹¹⁶ Child sex tourism is an abhorrent and intolerable crime. It allows for children to be treated as mere commodities that can be bought and sold.¹¹⁷ Although tourism itself is not to blame for the existence of the child sex industry,¹¹⁸ it does provide the opportunity for child sex tourism to occur¹¹⁹ and this problem is now a reality in South Africa.

The worldwide increase of child sex tourism demonstrates the need for a comprehensive response to the problem. It is the responsibility of governments, parents, social and legal

¹¹¹ Act 121 of 1998.

¹¹² Act 13 of 2002.

¹¹³ Act 75 of 1997.

¹¹⁴ Act 65 of 1996.

¹¹⁵ Act 25 of 2002.

¹¹⁶ Klain n 2 page 32.

¹¹⁷ Best "The Role of Customs in Monitoring Child Pornography" in *Enforcing the Law* n 11 page 26.

¹¹⁸ Tourism brings the country great economic benefits, but it is "the right kind of tourism" that needs to be encouraged. see ECPAT n 20 page 2.

¹¹⁹ Merten n 13.

organisations, law enforcement officials, the criminal-justice system and society as a whole to ensure that the lives of all children are respected, protected and valued.¹²⁰

Steps are being taken both nationally and internationally to target child sex tourism.¹²¹ It is expected that the passing of new legislation containing specific provisions on child sex tourism will bring about some positive changes in the way this problem is dealt with in South African law.¹²²

¹²⁰ Klain n 2 page 50.

¹²¹ TED n 36.

¹²² ECPAT n 63.

CHAPTER 2

INTERNATIONAL LAW PERTAINING TO CHILD SEX TOURISM

1. INTRODUCTION

Child sex tourism is a crime involving an international tourist market for child sex. Child sex tourists travel to other countries for the purpose of engaging in sexual activities with children, many of them believing that such activities are both legally and culturally acceptable in destination countries.¹ The fact that tourism is being used as a “vehicle” to initiate contact with child sex workers in different parts of the world² necessitates looking at child sex tourism from an international perspective.

This chapter will focus on South Africa’s international child protection obligations through customary international law and the various treaties at both world level and regional level to which South Africa has become a party. It will clarify the place of these international obligations in South African municipal law and assess how they can be applied to protect children from child sex tourism.

2. INTERNATIONAL CUSTOM AND TREATIES

International law comprises of a system of rules and principles that govern the international relations between sovereign states. However, it is also concerned with the rights and obligations of the individual. International law facilitates the functioning of the international community. It seeks to control states by inhibiting or directing their conduct, both in their

¹ Preda Foundation Inc. “Success in battle against sex tourism” at <http://www.preda.org/research/r010211003.html> (Date accessed: 21/02/03).

² Smallberger *The extent and impact of sex tourism in certain metropolitan areas* (1999) 106.

relations with other states and in relation to individuals, whether it be individuals of other states or their own nationals.³

In practice, international law is recognised as law. The governments of states are of the opinion that they are legally bound by the rules of international law.⁴ States not only recognise the rules of international law in numerous treaties but affirm constantly the fact that there is a law governing their relationship with one another.⁵ Common consent appears to be the main reason for obeying international law i.e. states have agreed to be bound by these generally accepted rules for conducting their international relations.⁶

Custom is the original source of international law in particular and of law in general. Essentially, custom is the common law of the international legal order.⁷ It has evolved from the practice or custom common to a significant number of states. State practice includes but is not limited to actual activity, statements made regarding concrete situations or disputes, statements of legal principle made in the abstract, national legislation and the practice of international organisations.⁸

International customary rules bind all states, except for those that have consistently and openly objected to the rule from its inception. However, consistent objection to a customary rule where that rule is also a peremptory norm of international law (that is, *jus cogens* norm) is unacceptable. No derogation is allowed from *jus cogens* norms, which generally comprise fundamental human rights and rules of international humanitarian law, as well as the prohibition of the use of unlawful armed force.⁹

Despite the significance of custom, in recent times, treaties have emerged as the most important source of international law.¹⁰ International treaties are agreements of a contractual nature between states or organisations of states, creating legal rights and obligations between the State Parties.¹¹ Treaties are legally binding because of the existence of a customary

³ Dixon *International Law* (2005) 3.

⁴ Jennings & Watts *Oppenheim's International Law: A Treatise Vol 1-Peace* (1992) 13.

⁵ Dugard *International law: A South African Perspective* (2005) 9-10.

⁶ Von Glahn *Law Among Nations: An Introduction to Public International Law* (1996) 9.

⁷ Kelsen *Principles of International Law* (1966) 444.

⁸ Dixon n 3 pages 28-30.

⁹ Bantekas & Nash *International Criminal Law* (2001) 3.

¹⁰ Von Glahn n 6 page 10.

¹¹ Schwarzenberger *A Manual of International Law* (1967) 33.

international rule that treaties are binding. This is expressed in the maxim *pacta sunt servanda*.¹²

The effect of a treaty upon contracting parties is that they are bound by its provisions and obligated to execute it in all parts.¹³ Broadly speaking, signature of a treaty results in an obligation to refrain from acts which would defeat the object or purpose of the treaty until the signatory has made clear its intention to become a party to the treaty.¹⁴ Ratification is the process whereby a state finally confirms its intention to be bound by treaty which it has previously signed.¹⁵

In essence, treaties require that a State Party should review its national legislation and ensure that it is consistent with that treaty.¹⁶ Treaties are a means by which states can create specific obligations by way of a conscious deliberate act and are therefore more likely to be respected.¹⁷ In effect, treaties create general rules for future international conduct and also confirm and define existing customary rules of a general character.¹⁸ More specifically, children's rights and the standards to which all governments must aspire in realising these rights are concisely articulated in a number of international human rights treaties.¹⁹

3. THE PLACE OF INTERNATIONAL LAW IN SOUTH AFRICAN LAW

Nonetheless, a common problem in the implementation of international law in states is that despite ratification of a treaty, its provisions still cannot be applied nationally because they have not been incorporated into the national legal system. The adoption of clear constitutional

¹² This principle is enshrined in Article 26 of the Vienna Convention on the Law of Treaties of 1969 as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See Botha "National Treaty Law and Practice: South Africa" in Hollis, Blakeslee & Ederington (eds) *National Treaty Law and Practice* (2005) 583 (footnote 9): "South Africa is not a party to the Convention, but to the extent that its provisions represent a codification of customary international law, it is 'law' in the Republic in terms of section 232 of the Constitution."

¹³ Kelsen n 7 page 456.

¹⁴ Article 18 of The Vienna Convention on the Law of Treaties of 1969. See Maryan Green *International Law* (1987) 167.

¹⁵ Dixon n 3 page 59.

¹⁶ Sloth Nielsen "Ratification of the UN Convention on the Rights of the Child: Some implications for South African Law" 1995 *SAJHR* 401 417.

¹⁷ Dixon n 3 page 25.

¹⁸ Dugard n 5 page 28.

¹⁹ Lloyd "A theoretical analysis of the reality of children's rights in Africa: An introduction to the Africa Charter on the Rights and Welfare of the Child" 2002 *African Human Rights Law Journal* 11 12.

provisions on the incorporation and application of international law provides national courts with a tool “to enrich national law with international standards.”²⁰

In fact, the application of treaties depends greatly on the status of international human rights law in a national legal system. It is highly unlikely that municipal courts will make a finding based on the provisions of an international treaty if it is not regarded as part of national law. The courts would then most likely use it as an interpretive aid.²¹ It is therefore important to establish the place of international treaties effecting child sex tourism in the South African legal system.

Notably, South Africa has adopted specific constitutional provisions regarding the status of international law in South African law.²² In terms of section 232, customary international law is recognised as being part of South African law to the extent that it is not inconsistent with the Constitution or an Act of Parliament. Common law rules and judicial decisions are now subordinate to customary international law.²³

Treaties, on the other hand, are only binding on the Republic once they have been approved by resolution by both houses of Parliament.²⁴ A ratified treaty only becomes a part of South African law when it is incorporated into law by national legislation.²⁵ As none of the human rights treaties ratified by South Africa which effect the issue of child sex tourism have been fully incorporated into South African law, they are not binding in themselves in South African courts.²⁶ South African courts must, however, use them in interpreting the meaning of the rights contained in the Bill of Rights²⁷ and these treaties are still binding under international law, meaning that South Africa can be held accountable

²⁰ *Ibid* page 30.

²¹ *Ibid*.

²² Maluwa “The incorporation of international law and its interpretational role in municipal legal systems in Africa: an exploratory survey” 1998 *SAYIL* 45 52.

²³ Dugard n 5 page 56.

²⁴ S 231 (2).

²⁵ S 231 (4).

²⁶ According to section 282 of the new Children’s Act 38 of 2005, the Palermo Protocol (to be discussed in par 4.6) acquires the force of law in the Republic, subject to the provisions of the Act. The Children’s Act has been assented to by the President but has not been promulgated yet.

²⁷ Rosa *The interpretive use of the Convention on the Rights of the Child in judicial decisions affecting children’s socio-economic rights in South Africa* (March 2005) 13, a Paper presented at the 4th World Congress on Family Law and Children’s Rights; van Reenen “The right to development in international and municipal law” 1995 *SAPR/PL* 417 441.

for non-compliance with their provisions through international mechanisms.²⁸ Furthermore, South Africa continues to be bound by international agreements which were binding on the country before the enactment of the Constitution.²⁹

However, the Constitution is relatively new law and many of South Africa's treaty obligations are even more recent, therefore the courts have not had many opportunities to pronounce expressly on sections 231 and 232.³⁰

Section 233 of the Constitution, dealing with the application of international law, states that:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

Correspondingly, section 39 of the Constitution provides that when interpreting the Bill of Rights, a court “must consider international law”.³¹ South African courts must use international law as an aid in the interpretation and application of legislation and the constitution itself.³² Section 233 is very wide and taken literally it could mean that all courts would have to test any legislation coming before them against international law. It is, however, doubtful that the courts will adopt such a wide approach. It is more likely that before a court will feel obliged to consider section 233, the legislation will have to demonstrate some “international element”.³³

In this regard, in *S v Makwanyane*, the Constitutional Court pronounced that both binding and non-binding international law can be used to interpret the Bill of Rights. Chaskalson P stated further that international agreements provide “a framework within which Chapter 3 can be understood” and “may provide guidance as to the correct interpretation of particular

²⁸ According to Bantekas, “[a] state that violates its treaty obligations by either failing to incorporate a treaty into its domestic legal system, or by omitting fundamental aspects of the treaty from its implementing statute, will generally be held liable vis-à-vis other contracting parties.” See Bantekas & Nash n 9 page 3.

²⁹ S 231(5). In this regard see Botha “Incorporation of treaties under the Interim Constitution: a pattern emerges?” 1995 *SAYIL* 196 203; Botha n 12 page 602-604; Olivier “The status of international law in South African municipal law: section 231 and the 1993 Constitution” 1993/94 *SAYIL* 1 4.

³⁰ Botha n 12 page 582; For more on the extent of the courts’ consideration of international law on children’s rights in South Africa, see Rosa & Dutschke “Child Rights at the Core: The Use of International Law in South African Cases on Children’s Socio-economic Rights” 2006 *SAJHR* 224.

³¹ S 39(1)(b).

³² Maluwa n 22 page 59.

³³ Botha n 12 page 604.

provisions.”³⁴ This statement means that the scope of international law encompasses not only “hard law” of customary rules and treaties, but also the “soft law”³⁵ contained in resolutions, declarations and guidelines drawn up by international bodies, and even international law not binding on South Africa.³⁶

As to the interpretive weight that should be given to international law, Scott and Alston propose that courts must adopt an interpretation of the Bill of Rights which promotes international law where it is substantively relevant and where it reflects the constitutional values of “an open and democratic society based on human dignity, equality and freedom”.³⁷ They argue that international law would thereby help to clarify and give content to those very values.³⁸

More recently in the *Grootboom* case the Constitutional Court stated that “[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa it may be directly applicable.”³⁹

Where conflict arises between international law and the Constitution or an Act of Parliament, the Constitution or Act will prevail.⁴⁰ However, almost every provision in the Bill of Rights has a corresponding provision in an international human rights treaty, or is governed by principles of international customary law hence it would be difficult to conceive a situation where international law would not be applicable under these provisions.⁴¹

³⁴ 1995 BCLR 665 (CC) paras 35-37; Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 745.

³⁵ This is the name given to rules of international law that do not provide concrete rights or obligations for the legal persons to whom they are addressed. They are rules of law but their content is inherently flexible or vague. See Dixon n 3 page 47.

³⁶ Maluwa n 22 page 60.

³⁷ S 39(1)(a) of the Constitution.

³⁸ Scott & Alston “Adjudicating constitutional priorities in a transnational context: a comment on Soobramoney’s legacy and Grootboom’s promise” 2000 *SAJHR* 206 222.

³⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 26.

⁴⁰ S 231 and S 232 of the Constitution.

⁴¹ Maluwa n 22 page 60.

4. PROTECTION OF CHILDREN'S RIGHTS AT WORLD LEVEL

Consequently, the international treaties relevant to child sex tourism which have been ratified by South Africa are relevant to child protection on a national level.

South Africa has ratified numerous Conventions, Protocols and Charters dealing with children's rights, trafficking in persons, child labour, and discrimination against women and young girls, all of which contain provisions prohibiting sexual exploitation in various forms.⁴² In doing so South Africa has made a global commitment to honour these international instruments and give effect to them. There is an obligation on the South African government to create structures and implement mechanisms and resources to combat such exploitation, of which child sex tourism is a part.⁴³

This section therefore comprises of an overview of the various international instruments which are relevant to the issue of child sex tourism.

4.1 THE UNITED NATION'S CONVENTION ON THE RIGHTS OF THE CHILD⁴⁴

The primary treaty related to the international protection of children is unquestionably the Convention on the Rights of the Child. It is the first binding universal treaty dedicated in its entirety to the protection of children's rights.⁴⁵ The Convention establishes in international law that State Parties must ensure that all children benefit from protection and assistance which caters to their specific needs and are informed about and participate in achieving their rights in an active manner.⁴⁶

⁴² According to Michael King, the recent surge of treaties, charters, conventions and constitutions represents a "symbolic denial" that society has gone past the point of no return as far as appealing to the moral consensus on the subject of children's rights. See King "Against children's rights" 1996 *Acta Juridica* 28 39.

⁴³ Follentine, A response by the Department of Social Services *Sexual Exploitation of Children* 16 October 2001 3.

⁴⁴ United Nations Convention on the Rights of the Child, 20 November 1989, G.A. Res. 44/25 (also available on Internet at <http://www.hri.ca/uninfo/treaties/25.shtml> (Date accessed: 19/03/03).

⁴⁵ Fottrell "One step forward or two steps sideways? Assessing the first decade of the Children's Convention on the Rights of the Child" in Fottrell (ed) *Revisiting Children's Rights* (2000) 1.

⁴⁶ Sloth-Nielsen n 16 page 401-403.

The Convention on the Rights of the Child was unanimously adopted by the United Nations General Assembly on 20 November 1989 and came into force on 2 September 1990.⁴⁷ For the first time, human rights standards pertaining to children rights were encompassed into a single legal instrument.⁴⁸ The Convention is in force in virtually the entire community of nations, thus providing a common legal and moral framework for the development of an agenda for children. In fact it has been ratified by more countries than any other human rights treaty in history.⁴⁹

South Africa ratified the Convention on the Rights of the Child in June 1995 and in doing so bound itself to taking measures to protect children from all forms of sexual exploitation and economic exploitation, that is, from any work that is likely to be hazardous to the child's health or physical, mental, spiritual, moral or social development.⁵⁰ Significantly, the Convention has established legally binding principles and international standards for states to meet in domestic legislation. In fact, in April 1994, upon his inauguration, the South African President announced his dedication to applying the principles of this Convention in South African domestic law.⁵¹

To begin with, Article 1 of the Convention defines a child as "every human being below the age of 18 years" within a State's jurisdiction, unless such person has been afforded majority status under the law applicable to him or her. The Convention therefore relates to all children within a particular country's territory, including foreign and refugee children,⁵² who are often apart from their families and in unfamiliar surroundings and hence vulnerable to child sex tourism.

Essentially, State Parties to the Convention are required to take all appropriate legislative and administrative measures to protect children from all forms of violence, exploitation, injury or abuse, including sexual abuse, while in the care of parents or any other person who has the

⁴⁷ Jinabhai "The situation of the Child in South Africa" in CDS (eds) *International Conference on the Rights of the Child* (1996) 57; Freeman "Introduction: Children as Persons" in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 1.

⁴⁸ Lloyd n 19 page 30.

⁴⁹ *Ibid* page 13.

⁵⁰ Article 32.

⁵¹ Sloth-Nielsen n 16 pages 401-402.

⁵² *Ibid* page 411.

care of the child.⁵³ This entails the protection of children from the conduct of parents who allow for them to be sexually exploited by sex tourists, for example.

In addition State Parties undertake to protect children from all forms of sexual exploitation by taking all appropriate national, bilateral and multi-cultural measures to prevent children from being coerced or induced to participate in unlawful sexual activities, used in prostitution or other unlawful sexual practices or used in pornographic performances and material.⁵⁴ The activities prohibited by this provision all relate to the crime of child sex tourism.

In relation to child trafficking, the Convention requires that all State Parties take measures to combat the illicit transfer and non-return of children abroad. State Parties are obligated to take all appropriate national, bilateral and multilateral measures to prevent the sale of, abduction of or traffic in children for any purpose.⁵⁵ Facilitators of child sex are targeted by this provision.

Furthermore, State Parties are required to take all appropriate measures to promote both the recovery and social reintegration of a child who has been a victim of any form of exploitation or abuse. The actual effect of this is that South Africa is obliged to protect child survivors of sexual exploitation from any secondary victimisation by the law. In support of this, the Convention places an obligation on State Parties to ensure that no child is deprived of his or her liberty unlawfully and that every child who has been deprived of liberty is treated with humanity and respect for his or her inherent dignity, taking into account his or her age. It states further that every child deprived of his or her liberty has the right to prompt access to legal assistance and the right to challenge the legality of the deprivation of his or her liberty before the court.⁵⁶ These provisions are of particular significance to victims of child trafficking who are arrested and prosecuted under immigration laws.

With all certainty, the healthy development of children is essential to the future well being of any society. In this regard, the Convention recognises the right of every child to live according to a standard that is adequate for his or her physical, mental, spiritual and moral

⁵³ Article 19.

⁵⁴ Article 34. See discussion in Hesselink-Louw, Bezuidenhout & Boniface “South African Law and Child Prostitution: an Overview” 2004 *Stell LR* 352 359-360.

⁵⁵ Article 35.

⁵⁶ Article 37.

development.⁵⁷ This provision would translate into State Parties paying attention to the root causes which force children into sexually exploitative situations such as poverty and poor socio-economic circumstances and to develop measures to combat them.⁵⁸

To further safeguard the standards in which children live, the Convention states that in all actions concerning children, the best interests of the child must be a primary consideration.⁵⁹ This means that all legislation, administrative acts, judicial decisions, political decisions and government policy should be formulated and/or applied with the best interests of the child in mind.⁶⁰

Regarding the issue of child labour, the Convention protects children from economic exploitation and performing work which is hazardous to their health. State Parties are compelled to provide legal rules which prescribe a minimum age of employment.⁶¹ This provision would impact on the conduct of hotel owners, bar owners or pimps etc. who “employ”⁶² children to provide sexual services to child sex tourists.

Primarily the Convention constitutes a common reference against which progress in meeting the standards for children rights can be assessed and results compared. State Parties are required to submit periodic reports on their progress in achieving all the rights to the Committee on the Rights of the Child, a committee of internationally elected and independent experts in children’s rights.⁶³ The principal function of the Committee is to operate this system of reporting as provided for in Articles 44 and 45. The Committee on the Rights of the Child is not as concerned with the method of application of the Convention into domestic law

⁵⁷ Article 27.

⁵⁸ Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation-South Africa* (August 2000) 66.

⁵⁹ Article 3.

⁶⁰ Sloth-Nielsen n 16 page 409.

⁶¹ Article 32.

⁶² Employment is defined by the United Nations as: “Possession or performance of a job.” Within the United Nations system, employment matters fall within the competence of the International Labour Organisation (ILO). The ILO General Conference adopted a Convention Concerning Employment Policy on 9 July 1964 in terms of which ILO member states are expected to pursue, amongst others, the aim of free choice of employment. See Ozmanczyk *Encyclopedia of the United Nations and International Agreements* (2003) 625.

⁶³ Viljoen “Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” 1998 *CILSA* 199 200.

as it is in the legal protection of its principles and provisions. South Africa made its initial report to the Committee in 1999.⁶⁴

In effect the adoption of this Convention has inspired a process of change and the implementation of its provisions in all parts of the world. It contains a coherent set of legally binding norms and principles within which legal and policy development can take place in South Africa.⁶⁵ Its provisions have served as a standard for the development of children's rights within the South African Constitution.⁶⁶ In light of this, Sloth-Nielsen believes that the Convention is destined to fulfill its intended role of improving the lives of children.⁶⁷

More to the point, the principles embodied in the Convention have been reflected in various pieces of South African legislation and have led to the review of the Child Care Act⁶⁸ and the passing of the Children's Act⁶⁹ as will be discussed in chapter 4 of the dissertation. Reference has also been made to its provisions in case law.⁷⁰

By ratifying the Convention on the Rights of the Child, South Africa has made a commitment to put its provisions into practice. However, the principles contained in the Convention can only become a reality when they are respected by every member of society from within the family to people in all levels of administration.⁷¹

Overall, the Convention is laudable in that it contains provisions pertaining to the conduct of the various role players in child sex tourism.

⁶⁴ State Party Report by South Africa (CRC/C/51/Add.2) of 22 May 1999.

⁶⁵ Sloth-Nielsen n 16 page 420.

⁶⁶ Section 28.

⁶⁷ Sloth-Nielsen n 16 page 420.

⁶⁸ Act 74 of 83.

⁶⁹ Act 38 of 2005.

⁷⁰ *Centre for Child Law & Another v Minister of Home Affairs and Others*, Case No: 22866 para 25. Unreported (High Court of South Africa (Transvaal Provincial Division)); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 75 and *Bhe & Others v Magistrate, Khayelitsha & Other* 2005 (1) SA 580 (CC).

⁷¹ UNICEF "UNICEF-assisted programmes in the area of: Children in need of special protection measures" 1 at <http://www.unicef.org/crc/protection.htm> (Date accessed 13/09/04).

4.2 UNITED NATIONS COMMISSION ON HUMAN RIGHTS RESOLUTION ON THE RIGHTS OF THE CHILD⁷²

Related to the above Convention is the United Nations Commission on Human Rights Resolution on the Rights of the Child. The Resolution urges all states that have not yet done so, to ratify the Convention on the Rights of the Child as a matter of priority, with a view to reaching universal adherence to its principles.⁷³ Resolutions are not binding on States as such and have the nature of recommendations.⁷⁴ They cannot however be ignored as they may “harden” into a treaty or become customary international law.⁷⁵

The significance of this particular Resolution is that it specifically recognises child sex tourism as a form of sexual exploitation against children and calls upon states to penalise child sex tourism specifically through extraterritorial legislation.⁷⁶

The United Nations Commission by way of this Resolution calls upon States:

- i) to facilitate the participation of child victims of sexual exploitation in the development of strategies;⁷⁷
- ii) to ensure the effective implementation of the relevant international instruments concerning the prevention and the combat of trafficking and sale of children⁷⁸ and
- iii) to criminalise and effectively penalize all forms of sexual exploitation and sexual abuse of children, including child sex tourism.⁷⁹

Moreover, the Resolution calls upon states to protect refugee children, unaccompanied children and internally displaced children who are especially vulnerable to sexual

⁷² Commission on Human Rights Resolution on the Rights of the Child 2002/92 (Available on Internet at [http://www.unhchr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.RES.2002.9](http://www.unhchr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.RES.2002.9) (Date accessed: 26/02/03).

⁷³ Article 1.

⁷⁴ A Resolution is defined by the United Nations as “a formal decision adopted by an intergovernmental institution by majority vote or by consensus without a vote.” See Ozmanczyk n 62 page 1919.

⁷⁵ Evans *International Law* (2003) 175.

⁷⁶ S 32(c).

⁷⁷ S 32(a).

⁷⁸ *Ibid.*

⁷⁹ S 32(c).

exploitation.⁸⁰ It also contains specific sections dealing with the protection of the girl child from discrimination, all forms of violence and forced marriages.⁸¹

States are also called upon to apply preventative and enforcement measures targeting customers or individuals who engage in the sexual exploitation of children⁸² and to adopt a holistic approach to addressing the contributing factors, including poverty and trafficking in children.⁸³

This Resolution therefore improves on the protection against child sex tourism already afforded by the Convention on the Rights of the Child.

4.3 DECLARATION AND AGENDA OF ACTION

Further improvement on international child protection came at the First World Congress against Commercial Sexual Exploitation of Children, held in Stockholm, Sweden in 1996. The Congress marked a significant breakthrough in the fight against the sexual exploitation of children. At this Congress it was agreed that commercial sexual exploitation of children amounted to a gross violation of fundamental human rights.⁸⁴

It was at this conference that 120 countries, including South Africa,⁸⁵ adopted the Declaration and Agenda of Action⁸⁶ against commercial sexual exploitation of children, which made provision for preventative and protective measures including, most importantly, extraterritorial criminal laws.⁸⁷

⁸⁰ S 28.

⁸¹ S 24.

⁸² S 32(d).

⁸³ S 32(f).

⁸⁴ World Vision UK *"No Child of Mine!" Opening the World's Eyes to the Sexual Exploitation of Children* (April 2002) 1-2.

⁸⁵ SALC *Sexual Offences: the substantive law* Project 107 (12 August 1999) 150.

⁸⁶ Declaration and Agenda for Action from the World Congress against the Commercial Exploitation of Children, Stockholm, Sweden, 27-31, 1996.

⁸⁷ ECPAT "Opening address: ECPAT international's regional consultation on the trafficking and sexual exploitation of children in Southern Africa, Johannesburg, March 3-6 2002" 1 at <http://www.socdev.gov.za/Statements/2002/March/ecpat.htm> (Date accessed 26/02/03).

The Declaration emphasises the need for concerted action on a local, national, regional and international level to bring sexual exploitation of children to an end.⁸⁸ It recognises the role of criminal networks in procuring and channelling children into commercial exploitation and mentions corruption, inadequate laws and inefficient law enforcement as areas that require attention.⁸⁹ The Declaration stresses that greater political will and improved allocation of resources are vital to giving effect to the child protection laws and policies already in existence.⁹⁰

The Agenda of Action aims to highlight existing international commitments, to identify priorities for action and to assist in the implementation of the relevant international instruments. In terms of the Agenda, State Parties agreed:

- i) to educate government personnel and members of the public about children's rights and the illegality of commercial exploitation of children;⁹¹
- ii) to promote responsible sexual attitudes and behaviour in society;⁹²
- iii) to establish educational programmes and monitoring networks to counter the commercial sexual exploitation of children;⁹³
- iv) to develop, strengthen and implement sex tourism laws to criminalise the acts of the nationals of countries of origin when committed against children in the countries of destination;⁹⁴ and
- v) to strengthen laws and law enforcement regarding sex crimes committed against children.⁹⁵

In accordance with its commitment to the Agenda of Action, South Africa has developed a National Plan of Action (NPA) on commercial sexual exploitation of children.⁹⁶

⁸⁸ Article 2.

⁸⁹ Article 7.

⁹⁰ Article 10.

⁹¹ Agenda Par 3(d).

⁹² *Ibid.*

⁹³ Agenda Par 3(f).

⁹⁴ Agenda Par 4(d).

⁹⁵ *Ibid.*

Implementation of the plan is coordinated by the Office of the Status of the Child in the Office of the Presidency. The National Plan of Action for Children in South Africa Sectoral Working Group has the task of distributing the plan throughout the country.⁹⁷

The objectives of the NPA are:

- i) to establish international co-operation;
- ii) to develop, review and or strengthen policies, legislation and programmes to prevent the commercial sexual exploitation of children;
- iii) to develop, review or strengthen policies, legislation and programmes to protect children;
- iv) to identify high risk children and to intervene early to prevent exploitation and
- v) to initialize specialised units or personnel among law enforcers to protect children.⁹⁸

Certainly these objectives will serve to curb child sex tourism. Significantly, the Agenda of Action also recognised the importance of developing an Optional Protocol on the sale of children, child prostitution and pornography.⁹⁹

4.4 OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY¹⁰⁰

The Optional Protocol to the Convention on the Rights of the Child deals specifically with prohibiting the sale of children,¹⁰¹ child prostitution¹⁰² and child pornography.¹⁰³ It was

⁹⁶ The full title is “Action Plan to Prevent and Combat the Commercial Sexual Exploitation of Children in South Africa”.

⁹⁷ ECPAT “Evaluation of South Africa” at <http://www.ecpat.net> (Date Accessed 1/09/05).

⁹⁸ N 96.

⁹⁹ N 86 Annexure 1.

¹⁰⁰ Office of the High Commissioner for Human Rights Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000). Available at <http://www.unhchr.ch/html/menu2/dopchild.htm> (Date accessed: 13 September 2004).

¹⁰¹ Article 2 defines the “sale of children” as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

adopted in order to strengthen the provisions of the Convention on the Rights of the Child.¹⁰⁴ It came into force on 18 January 2002 and was ratified by South Africa on 1 July 2003.

In relation to child sex tourism, the Optional Protocol calls on State Parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.¹⁰⁵ The Preamble expresses State Parties' grave concern at the increase in the international trafficking of children for the purpose of sexual exploitation and the widespread and continuing practice of child sex tourism which "directly promotes the sale of children, child prostitution and child pornography". It acknowledges that the girl child is at greater risk of sexual exploitation and recognises that a holistic approach is necessary to address the situation.¹⁰⁶

Importantly, the Protocol promotes international law enforcement co-operation with provisions covering diverse issues such as jurisdiction;¹⁰⁷ extradition;¹⁰⁸ mutual assistance in investigations, criminal or extradition proceedings¹⁰⁹ and seizure and confiscation of assets.¹¹⁰ It thereby places clear obligations on State Parties to take certain actions relating to the sale of children as a criminal offence, as opposed to the Convention on the Rights of the Child in terms of which State Parties merely agree to take "appropriate measures".¹¹¹

Particularly significant is the obligation on State Parties to ensure that all acts and activities related to the sale of children, child prostitution and child pornography are fully covered under their criminal law, whether these offences are committed domestically or transnationally, on an individual or organised basis. Such activities would include "offering, obtaining, procuring or providing a child for child prostitution" and the "offering, delivering

¹⁰² Article 2 defines "child prostitution" as "the use of a child in sexual activities for remuneration or any other form of consideration".

¹⁰³ Article 2 defines "child pornography" as "any representation, by whatever means of a child engaged in real or simulated explicit sexual activities or any other representation of the sexual parts of a child for primarily sexual purposes".

¹⁰⁴ Preamble of Protocol.

¹⁰⁵ Article 8.

¹⁰⁶ N 104.

¹⁰⁷ Article 4.

¹⁰⁸ Article 5.

¹⁰⁹ Article 6.

¹¹⁰ Article 7.

¹¹¹ Article 35.

or accepting, by whatever means” of a child for the purpose of sexual exploitation.¹¹² This would be relevant to the conduct of sex tourists and facilitators of child sex.

In relation to practice within the criminal justice system, the Optional Protocol places an obligation upon State Parties to adopt measures to protect the rights and interests of child victims of the prohibited acts throughout the criminal justice process.¹¹³ It also confirms that the best interest of a child must be a primary consideration in the treatment of that child.¹¹⁴

Essentially, State Parties are obligated to strengthen international co-operation through arrangements for the prevention, detection, investigation and prosecution of child prostitution, child pornography and child sex tourism.¹¹⁵ Furthermore, State Parties must promote international co-operation to assist child victims in their recovery, social reintegration and repatriation.¹¹⁶

South Africa remains firm in its commitment to protect and promote the rights of children and has ensured the enforcement of the Convention on the Rights of the Child and the Optional Protocol through the strengthening of its national laws and institutions.¹¹⁷

4.5 THE CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS¹¹⁸

More limited in its scope than the above instruments is the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This Convention, ratified by South Africa on 10 October 1951, deals with the procedures for combating the international trafficking of people, particularly women and children for the purpose of prostitution.

¹¹² Article 3 (1)(b); Article 2 defines child prostitution as “the use of a child in sexual activities for remuneration or any consideration.”

¹¹³ Article 8(1).

¹¹⁴ Article 8(3).

¹¹⁵ Article 10(1).

¹¹⁶ Article 10(2).

¹¹⁷ Permanent Mission of South Africa: Press Release “South Africa deposits its Instrument of Ratification to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography” 30 June 2003 found at <http://www.southafrica-newyork.net/pmun/speeches/rightsofthechild.htm>. (Date accessed: 16/09/04).

¹¹⁸ GA Res 317 (IV) of 2 December 1949, U.N Doc A/1251 (1949).

The preamble of the Convention declares that-

“...prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.”

According to the South African Law Commission (SALC), this limitation of the definition of trafficking to merely trafficking for the purposes of prostitution, excludes vast numbers of women and children from its protection. Trafficking in persons takes place for numerous reasons, prostitution only being one of them.¹¹⁹ A child trafficked for the purposes of sexual exploitation which does not amount to prostitution, is not protected by this Convention. The scope of the Convention is therefore very narrow.

The Convention requires State Parties to punish a person who procures, entices or leads away a person for the purposes of prostitution, with or without the consent of that person or “exploits the prostitution of another person, even with the consent of that person”.¹²⁰ Additionally, the Convention prohibits the running of a brothel and the renting of accommodation to be used for the purposes of prostitution.¹²¹ State Parties are also obliged to take the necessary measures to protect persons seeking employment from being exposed to the dangers of prostitution, particularly in the case of women and children.¹²² These provisions assist in curbing child trafficking and in turn child sex tourism.

In terms of Article 17, State Parties have agreed to adopt and maintain measures to check the traffic in persons for the purposes of prostitution and to make regulations for the protection of immigrants and emigrants, particularly women and children. Molo Songololo, a South African NGO, has criticised the Convention saying that “it conflates trafficking in children and women with prostitution and outlaws not only the trafficking for the purpose of prostitution but also prostitution”.¹²³ This issue is contentious.

¹¹⁹ SALC *Sexual Offences: Adult Prostitution* Project 107 (31 October 2002) 116.

¹²⁰ Article 1(1).

¹²¹ Article 2(1) and 2(2).

¹²² Article 20.

¹²³ Molo Songololo n 58 page 65.

This Convention has also been criticised for not making provision for international supervision.¹²⁴ It merely requests State Parties to give yearly communication to the Secretary-General of the United Nations of any laws and other measures implemented to give effect to the Convention.¹²⁵ The impact of the Convention in enforcing its child protection measures is thereby reduced.¹²⁶ The development of the undermentioned Protocol on trafficking is therefore a significant breakthrough.

4.6 UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND PALERMO PROTOCOL

Following the above 1949 Convention, there have been tremendous developments in the area of trafficking in persons. Due to the close link between trafficking and prostitution, these developments need to be closely examined.

On December 2000, 148 countries gathered in Palermo, Italy, to sign the United Nations Convention Against Transnational Organised Crime.¹²⁷ South Africa has ratified the Convention.¹²⁸ In relation to child sex tourism, the Convention and its Protocol impact on the conduct of child traffickers who facilitate child sex and those involved in the forced labour, slavery or servitude of children. It does not cover the act of actually committing a sex act with a child. This instrument would therefore have no effect on a sex tourist like Zimmerman, for example.

The Convention deals with organised crime very broadly, as it covers all structured groups which commit serious crimes.¹²⁹ It applies to offences that are transnational in nature and involve organised criminal groups.¹³⁰ However, the offence of trafficking in persons can be established in the national law of State Parties, regardless of the transnational nature of the offence or the involvement of organised criminal groups.¹³¹

¹²⁴ SALC n 119 page 115; UN Special Rapporteur Report 2000 at par 6.

¹²⁵ Article 21.

¹²⁶ SALC n 119 page 115.

¹²⁷ UN Doc A/55/383 (2000), entered into force on 29 September 2003.

¹²⁸ Sexual Offences and Community Affairs (SOCA) Unit, National Prosecuting Authority *Current South African Legislative Framework in Relation to the Trafficking in Persons International Instruments*, supplied by Advocate Nolwandle Qaba in 2005.

¹²⁹ SALC *Trafficking in persons* Issue Paper 25, Project 131(31 March 2004) 5.

¹³⁰ Article 3.

¹³¹ Article 34(2); SALC n 129 page 5.

The purpose of the Convention is: to prevent and combat trafficking in persons, particularly women and children; to protect and assist victims of trafficking with full respect for their human rights as well as to promote co-operation between State Parties to ensure the accomplishment of these objectives.¹³²

Consequently, the Convention calls for: the criminalisation of participation in an organised criminal group;¹³³ the criminalisation of the laundering of the proceeds of crime;¹³⁴ measures to enable the confiscation and seizure of assets gained through crime;¹³⁵ mutual legal assistance¹³⁶ and assistance to and protection of victims of trafficking.¹³⁷

Developed to supplement the Convention is the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol), which entered into force on 25 December 2003.¹³⁸ The Protocol has been ratified by South Africa.¹³⁹ The Palermo Protocol constitutes the first international instrument dealing comprehensively with the issue of trafficking in persons. It addresses the crime of trafficking on a transnational level.¹⁴⁰ The Protocol defines trafficking in persons as follows:

*“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”*¹⁴¹

Most significantly, the protocol places special emphasis on the prevention, suppression and punishment of trafficking in women and children for purposes of sexual exploitation and their forced entry into the sex industry.¹⁴² In terms of Article 3 of the Protocol, exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual

¹³² Article 2.

¹³³ Article 5.

¹³⁴ Article 6.

¹³⁵ Article 12.

¹³⁶ Article 18.

¹³⁷ Article 25.

¹³⁸ N 127.

¹³⁹ SOCA Unit n 128.

¹⁴⁰ SALC n 129 page 6.

¹⁴¹ Article 3(a); discussed in Gould “Countering Human Trafficking: Considerations and Constraints” June 2006 *SA Crime Quarterly* 19 20.

¹⁴² Molo Songololo n 58 page 69.

exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴³ Child sex tourism is encompassed in this provision.

Encouragingly, the Protocol provides for the safe return of victims to their countries of origin and the issuing of travel documents necessary for their re-entry.¹⁴⁴ Its provisions emphasize the need for prevention of trafficking in persons,¹⁴⁵ information exchange and training of officials,¹⁴⁶ strengthening of border control measures and security¹⁴⁷ and control of travel documents.¹⁴⁸ State Parties are required to implement policies that prevent child victims in particular from revictimisation.¹⁴⁹

In support of this the Protocol provides valuable information on the physical, psychological and social recovery of child victims of trafficking.¹⁵⁰ Special protection is afforded to children in that the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation is considered “trafficking in persons” even if this does not involve any of the actions contemplated in the definition of trafficking.¹⁵¹

It therefore deserves re-iteration that the ratification of the Convention and Protocol is a remarkable step forward in the protection of children from child sex tourism at world level.

4.7 CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOUR¹⁵²

Yet another significant instrument on child protection is the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. This Convention protects children from the conduct of those persons who “employ” children

¹⁴³ Article 3(a).

¹⁴⁴ Article 8.

¹⁴⁵ Article 9.

¹⁴⁶ Article 10.

¹⁴⁷ Article 11.

¹⁴⁸ Article 12.

¹⁴⁹ Article 9(a)(b).

¹⁵⁰ Article 6(3) (a-d); see Van Bueren *Child Sex Exploitation and the Law, a Report on the International Legal Framework and Current National Legislative and Enforcement Responses* 8.

¹⁵¹ Article 3(c).

¹⁵² ILO Convention No 182 of 1999.

to provide sexual services or facilitate child sex but not from the customer or child sex tourist who engages in sex with the child.

Interestingly, the scope of the Convention is not limited to the traditional problems surrounding child labour i.e. economic exploitation, but also several other related areas of concern including child prostitution and other forms of sexual exploitation.¹⁵³ Several of these related areas are not at all normal types of “labour” but rather constitute criminal offences in many countries. Their inclusion in the Convention does not mean that the International Labour Organisation (ILO) recognizes them as work.¹⁵⁴ They are included in ILO standards with the sole purpose of eradicating them because of the fact that they constitute forms of economic exploitation analogous to forced labour and slavery.¹⁵⁵

The Convention came into force on 19 November 2000. South Africa ratified it on 7 June 2000. It calls for “immediate and effective measures” to secure the prohibition and elimination of the worst forms of child labour as a “matter of urgency”¹⁵⁶ and covers all girls and boys under the age of 18 years.¹⁵⁷

Accordingly, State Parties to the Convention have agreed to take immediate and effective measures to prohibit and eliminate the worst forms of child labour.¹⁵⁸ The definition of the worst forms of child labour includes:

- i) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour;
- ii) the use, procuring or offering of a child for prostitution or the production of pornography;
- iii) the use of children in illicit activities and

¹⁵³ Noguchi “ILO Convention No, 182 on the worst forms of child labour and the Convention on the Rights of the Child” 2002 *International Journal of Children’s Rights* 355 358.

¹⁵⁴ Nogushi *Child Labour and Child Exploitation*, Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England (September 2001) 3.

¹⁵⁵ ILO Report VI (1) to International Labour Conference 86th session (1998) 66.

¹⁵⁶ Article 1.

¹⁵⁷ Article 2.

¹⁵⁸ Article 1.

iv) work which is likely to harm the health, safety or morals of the child.¹⁵⁹

Most notably this Convention considers prostitution to be one of the worst form of child labour unlike its predecessor, Convention No 29 of 1930, concerning forced labour. This broad definition covers situations by which children are sold to sex exploiters by their parents to perform domestic work and sexual tasks or acts by which children are procured or offered for any illicit activities.¹⁶⁰

Moreover, the Convention calls on State Parties to take “effective and time-bound” measures to prevent the engagement of children into these forms of labour, to assist in the removal of children from these forms of labour and to assist with their rehabilitation and social re-integration and to taken into account the special situation of the girl child.¹⁶¹

On a practical level, Recommendation No. 190, which accompanies the Convention, offers a wide range of guidelines for the implementation of the Convention. Recommendations do not have legally binding effect as in the case of Conventions and may therefore receive less attention as an international standard. However, this document is a unanimously adopted international instrument, reflecting global consensus of its contents and should be referred to as a guideline on action to be taken at local and international level.¹⁶²

4.8 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN¹⁶³

More limited in its scope in that it does not protect all children from child sex tourism but rather only the girl child, is the Convention on the Elimination of all Forms of Discrimination against Women. The Convention specifically states that its aim is to bring “the female half of humanity into the focus of human rights concerns”¹⁶⁴ and certain provisions make specific reference to young girls,¹⁶⁵ meaning that young girls are encompassed in the term “women”.

¹⁵⁹ Article 3

¹⁶⁰ Molo Songololo n 58 page 70.

¹⁶¹ Article 7.

¹⁶² Nogushi n 154 page 4.

¹⁶³ Adopted entered into force 3 September 1981)18 December 1979, G.A. Res. 34/180, U.N. GOAR, 34th Sess., No 46, UN Doc A/34/35 (1980) (entered into force 3 September 1981).

¹⁶⁴ Introduction preceding the Preamble.

¹⁶⁵ Reference is made to young “girls” in Articles 10(f) and 16 (2).

This Convention ratified by South Africa in 1995, is often referred to as the bill of rights for women.¹⁶⁶ Its provisions define what constitutes discrimination against women and create an agenda for action by which countries can put an end to such discrimination.¹⁶⁷ Discrimination against women constitutes “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ...”.¹⁶⁸ Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice and eliminate discrimination against women in all forms. This would include incorporating the principle of equality into their systems and abolishing all discriminatory laws.¹⁶⁹ South Africa has complied by enacting legislation to remove legislative stipulations discriminating against women¹⁷⁰ and by including an equality clause in the Constitution.¹⁷¹

Most significant is relation to child sex tourism is Article 16 which expressly states that the betrothal and marriage of a child shall be of no legal effect and that all required action, including the adoption of legislation, must be taken to establish a minimum age for marriage and to make the registration of marriages obligatory.¹⁷² This would protect girls from being sold to sex exploiters as “child brides” or sex slaves.¹⁷³ This may not be a form of child sex tourism but relates to it, in that, these practices perpetuate the treatment of children as sexual objects.

In its General Recommendations No 19, CEDAW addresses the issue of prostitution and sets out the economic basis for prostitution by stating that:

“Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence.”

¹⁶⁶ Division for the Advancement of Women “Convention on the Elimination of all Forms of Discrimination against Women” found at <http://www.un.org/womenwatch/daw/cedaw/>. (Date Accessed: 16/09/04).

¹⁶⁷ Preamble.

¹⁶⁸ Article 1.

¹⁶⁹ Division for the Advancement of Women n 166.

¹⁷⁰ General Law Fourth Amendment Act 132 of 1993; Dugard n 5 page 324.

¹⁷¹ Section 9 of the Constitution states that “[e]veryone is equal before the law” and “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds” including sex.

¹⁷² Article 16 (2).

¹⁷³ Koen, Van Vuuren & Anthony *The Trafficking of Children for Purposes of Sexual Exploitation – South Africa* (2000) 93.

In this regard States Parties to the Convention are required to take appropriate measures against all forms of trafficking in women¹⁷⁴ and the exploitation of the prostitution of women.¹⁷⁵ South Africa does not have specific trafficking legislation but does have legislation and common law in place to prohibit acts that form part of the trafficking “chain” such as procurement or abduction.¹⁷⁶

The Committee on the Elimination of Discrimination Against Women (CEDAW), was created to oversee the implementation of the Convention.¹⁷⁷ State Parties are required to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.¹⁷⁸ In its first country report to CEDAW, the South African government noted that while the Sexual Offences Act makes it an offence for South Africans to exploit women and traffic in women within the country, there is no specific legislation dealing with sex tourism or trafficking in women across South African borders.¹⁷⁹ In response to this CEDAW remarked that insufficient attention was being devoted to the problem of trafficking in women by the South African government. It recommended that both the legal situation and the reality of the problem be addressed and that further information on this issue be contained in South Africa’s next report.¹⁸⁰

In its General Recommendation No 24, CEDAW specifically lists girl children as a category of “vulnerable and disadvantaged” women. CEDAW has recognised that, in addition to the established forms of trafficking, new forms of sexual exploitation such as sex tourism have emerged that are incompatible with the equal enjoyment of rights by women and put women at special risk of abuse and violence.¹⁸¹

In December 2000, a landmark decision was taken by the General Assembly to adopt the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination without a vote.¹⁸² This was done in order to improve on and add to existing enforcement

¹⁷⁴ For more on the issue of trafficking in women, see IOM “SA Women lured into forced labour in Israel” October 2006 *Eye on Human Trafficking* 2.

¹⁷⁵ Article 6.

¹⁷⁶ SALC n 119 page 184.

¹⁷⁷ Article 17.

¹⁷⁸ Article 18.

¹⁷⁹ Article 6 of State Party Report by South Africa (CEDAW/C/ZAF/1) of 5 February 1998.

¹⁸⁰ SALC n 119 page 181.

¹⁸¹ General Recommendation No. 19 par 16. See SALC n 119 page 180.

¹⁸² A/Res/54/4.

mechanisms for women's human rights. The Optional Protocol came into force on 22 December 2000 and South Africa ratified it on 18 October 2005.¹⁸³

The Protocol contains two procedures. Firstly, a communications procedure, which gives individuals and groups of women the right to complain to CEDAW about violations of the Convention, once domestic remedies have been exhausted.¹⁸⁴ Secondly, there is an inquiry procedure, which allows CEDAW to initiate inquiries into situations of grave or systematic violations of women's rights.¹⁸⁵

Significantly, the Convention has had an impact on governmental policy in South Africa. In its Gender Policy Statement,¹⁸⁶ the Gender Directorate in the Department of Justice confirmed its commitment to "creating a legal environment to eliminate all forms of trafficking in women and children". The Policy Statement confirms that this framework "will" ensure that women and the girls enjoy the right to freedom and security of the person regardless of economic or occupational status. It will also assist in putting an end to the exploitation and abuse of, and discrimination against young girls who are prostitutes or sex workers.¹⁸⁷ The implementation of this policy will therefore assist in curbing child sex tourism.

5. PROTECTION OF CHILDREN'S RIGHTS AT REGIONAL LEVEL

Despite the existence of the Convention on the Rights of the Child, African states found it necessary to give African children a "voice" by setting out the standards for children's rights in a regional treaty.¹⁸⁸ The adoption of a regional treaty was seen to be the best way for Africa, with its unique culture, traditions and history, to handle and resolve its own children's rights issues.¹⁸⁹ These feelings were translated into the adoption of the African Charter on the Rights and Welfare of the Child.

¹⁸³ Division for the Advancement of Women n 166.

¹⁸⁴ Articles 2 and 4.

¹⁸⁵ Article 8.

¹⁸⁶ Gender Policy Statement of March 1999.

¹⁸⁷ Molo Songololo n 58 page 66.

¹⁸⁸ Lloyd n 19 page 13.

¹⁸⁹ Wako *Towards an African Charter on the Rights of the Child* (May 1998) 7, paper delivered at a workshop on the Draft Convention on the Rights of the Child in Nairobi.

The Convention on the Rights of the Child has been criticized for having insufficient African influence¹⁹⁰ in that only three African states were involved in drafting the Convention for five out of the nine years of the drafting process.¹⁹¹ Also, there is a belief that there are certain issues, unique to Africa, that are insufficiently addressed in or absent from the Convention. These issues include the disadvantages facing the female child, cultural practices of female genital mutilation and circumcision, poor socio-economic conditions and illiteracy.¹⁹²

5.1 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD¹⁹³

The African Charter was adopted by some of the Member States of the Organisation of African Unity (now the African Union). It was ratified by South Africa on 7 January 2000. State Parties to the Charter agree to recognise the rights and freedoms contained within it and to take the necessary steps to adopt legislative and other means necessary to effect the provisions of the Charter.¹⁹⁴ The Charter contains provisions related to the rights and responsibilities of children. Included in this are provisions which deal with the sexual exploitation, sale and trafficking of children which are relevant to the issue of child sex tourism.

Most significant, is the provision in terms of which all State Parties undertake to protect children from all forms of sexual exploitation and sexual abuse and to take measures to prevent the “inducement, coercion or encouragement” of a child to participate in sexual activity, the “use of children in prostitution or other sexual practices” and the “use of children in pornographic activities”.¹⁹⁵ This has a direct effect on the protection of children from child sex tourism.

Another key provision as far as child sex tourism is concerned, is the obligation placed on State Parties to prevent the sale, trafficking and abduction of children for any purpose, in any

¹⁹⁰ Lloyd n 19 page 15; Olowu “Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child” 2002 *The International Journal of Children’s Rights* 127 128.

¹⁹¹ Viljoen n 63 page 200; Muthogo “Analysis of the International Instruments for the Protection of the Rights of the Child” in CDS (eds) *International Conference on the Rights of the Child* (1996) 123.

¹⁹² Viljoen n 63 page 206.

¹⁹³ OAU Doc.CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

¹⁹⁴ Article 1(1).

¹⁹⁵ Article 27.

manner by any person, including a parent of that child.¹⁹⁶ This has an impact on parents as role players in facilitating child sex tourism.

Furthermore, the Charter protects children by imposing the obligation on State Parties to “take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental abuse, including sexual abuse, while in the care of the child.”¹⁹⁷ The Charter stresses the importance of establishing forms of prevention, reporting, investigation and follows up of all instances of child abuse.¹⁹⁸ This implies not only an obligation to introduce child protective legislation, such as the Child Care Act, but also to introduce legislative provisions relating to child sex tourism and child trafficking specifically. It also emphasises the need to provide measures to effectively implement those legislative provisions.¹⁹⁹

Also related to child sex tourism is the prohibition on child marriages and the betrothal of children. The Charter places an obligation on State Parties to pass legislation which “specify the minimum age of marriage to be 18 years”.²⁰⁰ This would cover the situation where children are sold by their parents as child brides and sexually exploited.²⁰¹ Before ratifying the Charter, the South African Parliament enacted the Recognition of Customary Marriages Act 120 of 1998, which requires prospective spouses to a customary marriage to be above the age of 18 years.²⁰² Section 4 of the Act, however, affords the Minister the discretion to grant written permission to children to marry if the Minister considers such marriage desirable and in the interests of the parties concerned. This exemption is contrary to the provisions of the Charter and needs to be addressed by the legislature. It remains to be seen just how far the exercise of this discretion will undermine the general prohibition in section 3(1) of the Act and of article 21(2) of the Charter.²⁰³

The issue of child labour in Africa is particularly sensitive. Traditionally, African children were considered to be resources for their families in that they could be used as labourers in the

¹⁹⁶ Article 29.

¹⁹⁷ Article 16.

¹⁹⁸ Davel “The African Charter on the Rights and Welfare of the Child, Family Law and Children’s Rights” 2002 *De Jure* 281 282.

¹⁹⁹ Molo Songololo n 58 page 66.

²⁰⁰ Article 21(2).

²⁰¹ Koen *et al* n 173 page 93.

²⁰² S 3 (1).

²⁰³ Davel n 198 page 285.

fields or in various domestic tasks in order to help sustain their families. It seems therefore that African culture and tradition have lent themselves to the economic exploitation of children.²⁰⁴ In fact ILO studies reveal that Africa has the highest percentage of child labourers in the world that being 41% of African children. Many of these children are victims of trafficking for forced labour who are placed in these exploitative situations by intermediaries, well known to their parents.²⁰⁵ Accordingly, State parties to the Charter agree that every child has the right to be protected from all forms of economic exploitation and from performing work which is hazardous to their physical, mental and moral development,²⁰⁶ which would include child prostitution.

Another positive aspect of the Charter is that it emphasizes that the best interests of the child is “the” primary consideration which is a higher standard than that provided for in the Convention on the Rights of the Child, which merely refers to “a” primary consideration.²⁰⁷ The use of a definitive article in the provision has significant practical ramifications for child victims. The lower standard is a procedural fairness requirement i.e. judges must “consider” what is in the best interest of the child but the decision may not reflect these interests.²⁰⁸

Special protection for the unique situation of the African child is evident in the obligation on State Parties to discourage any custom, tradition, cultural or religious practice contrary to the provisions of the Charter,²⁰⁹ which includes those which affect the welfare and dignity of the child and those which discriminate against the child on the basis of sex or other status.²¹⁰ This provision deals with aspects identified as *lacunae* in the Convention on the Rights of the Child.²¹¹ Cultural practices, such as female genital mutilation foster the image of girls as sexual objects thereby encouraging their subordinate status. Issues such as these are not

²⁰⁴ Gose *The African Charter on the Rights and Welfare of the Child* (2002) 60-61.

²⁰⁵ Fitzgibbon “Modern-day slavery? The scope of trafficking in persons in Africa” 2003 *African Security Review* 81 82.

²⁰⁶ Article 15.

²⁰⁷ Davel n 198 page 282.

²⁰⁸ Lloyd n 19 page 17. For a detailed discussion on the best interests principle see Van Bueren “A new children’s treaty” 1991 *International Children’s Rights Monitor* 20 21.

²⁰⁹ Article 1(3).

²¹⁰ Article 21; Kaime “The Convention on the Rights of the Child and the cultural legitimacy of Children’s Rights in Africa: Some Reflections” 2005 *African Human Rights Law Journal* 221 227-228.

²¹¹ Viljoen n 63 page 211.

addressed at all in the Convention.²¹² The Charter thus increases the level of protection afforded to African children in a number of ways.²¹³

In addition to this, the Charter also offers wider protection than the Convention on the Rights of the Child in that it defines those falling within its ambit as every human being below the age of 18, with no exception. The Convention on the Rights of the Child, on the other hand excludes application in respect of children who have obtained majority earlier than 18 years in terms of any law applicable to them.²¹⁴

It is vital that State Parties' compliance with their obligations to protect children against sexual exploitation be monitored. The task of monitoring and enforcement of the Charter lies with the African Committee of Experts on the Rights and Welfare of the Child, established in 2001. Its task, although similar to that of the Committee on the Rights of the Child, in that it may examine state reports on the measures that have been adopted, is far broader, in that it may also receive and consider communications from any person, group of persons or NGO.²¹⁵

The African Charter is a "key source of inspiration" for member states because it amounts to the collective recognition of the rights of African children and establishes a legal framework for their protection.²¹⁶ It is a progressive development in human rights protection in Africa.²¹⁷ It confirms and strengthens the global standards in the Convention on the Rights of the Child. Lloyd believes that jurisprudence that best suits the needs African children will gradually emerge within municipal courts.²¹⁸

Although the Charter has not been incorporated into South African law by national legislation, it is still applicable in terms of section 233 of the Constitution, as discussed above. South Africa has also adopted numerous laws and other measures to give effect to the provisions of the Charter and its provisions have been mentioned in case law.²¹⁹ The South African legal system is beginning to mirror the protection of rights as provided for in the

²¹² *Ibid* page 206.

²¹³ Davel n 198 page 282.

²¹⁴ Article 1 of the Convention on the Rights of the Child.

²¹⁵ Article 44(2). See Viljoen n 63 page 210.

²¹⁶ Lloyd n 19 page 15.

²¹⁷ Madotyeni "States must give meaning to treaty" April/May 2000 *ChildrenFirst* 30 30; Olowu n 190 page 130.

²¹⁸ Lloyd n 19 page 23.

²¹⁹ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC).

Charter. This will specifically protect African children, with their unique culture and circumstances from atrocities such as child sex tourism.

6. CONCLUSION

As is apparent, South Africa has ratified numerous international instruments on children's rights, trafficking in persons, child labour, and discrimination against women and young girls. It is important to sum of the impact of each of instruments on child sex tourism in South Africa.

In terms of the Convention on the Rights of the Child, South Africa has undertaken to protect children from all forms of sexual exploitation by taking all appropriate measures to prevent children from being forced or induced to participate in unlawful sexual activities, used in prostitution or other unlawful sexual practices.²²⁰ The Optional Protocol to the Convention recognizes the continuing practice of child sex tourism as a phenomenon which directly promotes the sale of children, child prostitution and child pornography and calls on State Parties to protect children from these atrocities.²²¹

The United Nations Commission on Human Rights Resolution on the Rights of the Child is of great significance as it specifically recognises child sex tourism as a form of sexual exploitation against children and calls upon states to penalise child sex tourism specifically through extraterritorial legislation²²²

The Declaration and Agenda of Action²²³ against commercial sexual exploitation of children adopted by South Africa makes provision for both preventative and protective measures to assist children.²²⁴ Encouragingly, South Africa has developed a National Plan of Action

²²⁰ Article 34. See discussion in Hesselink-Louw *et al* n 54 pages 359-360.

²²¹ Article 8.

²²² S 32(c).

²²³ N 86.

²²⁴ ECPAT n 87 page 1.

(NPA) on commercial sexual exploitation of children in line with its commitment to the Agenda of Action.

South Africa's ratification of the Convention on Organised Crime and the Palermo Protocol is a remarkable step forward in the protection of children from child sex tourism. The Convention aims to prevent and combat trafficking in children and to protect and assist child victims of trafficking. The Protocol places special emphasis on the prevention, suppression and punishment of trafficking in children for purposes of sexual exploitation and their forced entry into the sex industry.²²⁵ South Africa is required in terms of this instrument to implement policies that prevent child victims in particular from secondary victimisation by the law.²²⁶

Significantly, the Convention on the Elimination of the Worst Forms of Child Labour considers prostitution to be one of the worst forms of child labour. By ratifying it, South Africa has agreed to protect children from those persons who "employ" children to provide sexual services and other facilitators of child sex like child traffickers, for example.

Importantly also, the Convention on the Elimination of Discrimination against Women has had an impact on governmental policy in South Africa which will assist in putting an end to the exploitation and abuse of, and discrimination against young girls who are prostitutes or sex workers.²²⁷ The implementation of this policy will assist in curbing child sex tourism in South Africa.

At regional level, the African Charter on the Welfare of the Child is a progressive development in children's rights protection in Africa.²²⁸ The Charter contains provisions which deal with the prohibition of sexual exploitation, sale and trafficking of children. It places an obligation on the South African government to create structures and implement mechanisms and resources to combat such exploitation, of which child sex tourism is a part.²²⁹

²²⁵ Molo Songololo n 58 page 69.

²²⁶ Article 9(a)(b).

²²⁷ Molo Songololo n 58 page 66.

²²⁸ Madotyeni n 217 page 30; Olowu n 190 page 130.

²²⁹ Follentine n 43 page 3.

Overall, these international instruments are laudable in that they effect the various role players in child sex tourism. In ratifying them, South Africa has made a global commitment to honour their provisions and give effect to them. South Africa has adopted specific constitutional provisions regarding the status of international law in South African law.²³⁰ Therefore, the treaties expounded on this chapter are applicable to child protection on a national level. The South African government is therefore under an international obligation to create structures and implement mechanisms and resources to combat child sex tourism.²³¹

²³⁰ Maluwa n 22 page 52.

²³¹ Follentine n 43 page 3.

CHAPTER 3

CHILD SEX TOURISM AS A SEXUAL OFFENCE

1. INTRODUCTION

The focal point of this chapter is to examine child sex tourism as a sexual offence. South Africa does not have legislation that specifically prohibits child sex tourism. There are, however, legal measures that allow for the arrest, prosecution and conviction of sex exploiters and traffickers for offences related to child prostitution, abduction and various other forms of sexual exploitation of children.¹

This chapter will focus on the provisions of the Sexual Offences Act² and common law offences related to child sex tourism and assess their efficiency in addressing the problem. It will also outline the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill³ and assess how they improve on the current sexual offences laws in protecting children from child sex tourism.

2. THE SEXUAL OFFENCES ACT

The Sexual Offences Act is the Act dedicated to the protection of victims of sexual offences and the prosecution of sex offenders. It covers a wide range of offences relating to sexual intercourse and sexually indecent acts as well as the various facets of prostitution such as solicitation, procurement of females as prostitutes, brothel-keeping and living off the earnings of prostitution.⁴

¹ See an overview of these legal measures in Spies (ed) *Sexual Abuse: Dynamics, assessment & healing* (2006) 127-148.

² Act 23 of 1957.

³ B-2006, which will hereinafter be referred to as the Sexual Offences Bill.

⁴ Snyman *Criminal Law* (2002) 362; Burchell *Principles of Criminal Law* (2005) 885.

The most significant provision in relation to child sex tourism is section 14(1) which covers a wide range of sexual offences against both male and female children. It states that any male who “attempts to have unlawful carnal intercourse with a girl under 16 years of age;⁵ commits or attempts to commit an immoral or indecent act with a boy under the age of 19 years⁶ or “solicits or entices such girl or boy” to commit an immoral or indecent act,⁷ is guilty of an offence. A person who is charged with an offence in terms of this section can raise a defense that the girl was a prostitute at the time the offence was committed; that he was under the age of 21 at the time; that this was his first time being charged with such an offence⁸ or that the girl deceived him into believing that she was over 16 years of age.⁹ This section impacts on the conduct of male child sex tourists. Swiss child sex tourist, Zimmerman,¹⁰ was initially arrested on suspicion of contravening section 14.¹¹ It can therefore be a useful provision in child sex tourism cases, however, its merits lie in the way in which it is applied.

Furthermore, the Act provides for the arrest of any person who resides in or frequents a house used for the purpose of prostitution if he or she is living off the earnings of prostitution.¹² It makes no provision for the confiscation of the house or property in question. The South African Law Commission (SALC) recommends more stringent measures similar to those provided for in the Prevention of Organised Crime Act of 1998¹³ such as confiscation of property, fines, revoking of trade licences etc.

Also significant in relation to child sex tourism is section 20(1)(a) of the Act, which relates to persons living off the earnings of prostitution or to those committing or assisting in the commission of indecent acts. This section criminalises the conduct of pimps and child prostitutes themselves. The section provides that:

“1) [a]ny person who-
 (a) knowingly lives wholly or in part on the earnings of prostitution; or
 (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or

⁵ S 14(1)(a).

⁶ S 14(1)(b).

⁷ S 14(1)(c).

⁸ S 14(2)(a).

⁹ S 14(2)(b).

¹⁰ details of case contained in chapter 1.

¹¹ Sapa “Swiss ‘sex tourist’ nabbed in Sandton at <http://www.mg.co.za/article> (Mail & Guardian Online) (Date accessed 27/02/2006).

¹² Section 20 (2).

¹³ Act 121 of 1998.

- (b) *in public commits any act of indecency with another person; or*
- (c) *in public or private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person, shall be guilty of an offence.”*

An obvious criticism of this section is that it fails to differentiate between children who are knowingly living off the earnings of prostitution and the adults doing the same. This differentiation is important to provide for a situation where child prostitutes are using their earnings to support their minor siblings.¹⁴ These minor siblings are not protected from criminal liability.

The Act goes further by criminalising the act of sex for reward in section 20(1)(aA). The gist of this section is that prostitute carrying on his or her trade as such is guilty of an offence. This section was added to the Sexual Offences Act when the Appellate Division in *S v H*¹⁵ held that the act of prostitution does not amount to an offence of knowingly living off the earnings of prostitution. The Act, however, is silent with regard to the age of the prostitute and does not stipulate to whom the reward is paid. A child forced to engage in sexual intercourse for reward (which may or not go to the child) can be charged with an offence in terms of this section.¹⁶ Section 20(1)(a) and 20(1)(aA) carry a penalty of imprisonment not exceeding 3 years.

One interpretation of section 20(1)(aA) is that the customer’s conduct is not criminalised or regulated in any manner.¹⁷ If this interpretation were to be accepted, it is the opinion of the SALC that it would be hypocritical of our legislature to penalise the conduct of child prostitutes and then allow the customers who are responsible for the prevalence of prostitution to act without fear of prosecution.¹⁸

Clarity on this issue is provided in *S v Jordan*,¹⁹ a Constitutional Court case dealing with the issue of prostitution in South African law. The case did not involve children but has ramifications for children as section 20(1)(aA) is silent with regard to the age of the prostitute.

¹⁴ SALC *Sexual Offences: the substantive law* Project 107 (12 August 1999) 156; The Namibian “SA’s child sex shame revealed” at <http://www.namibian.com> (Date accessed 21/02/03).

¹⁵ 1988 (3) SA 545 (AD).

¹⁶ See SALC n 14 page 156, in which the South African Law Commission recommended that provision be made for an outright prohibition on child prostitution.

¹⁷ SALC n 14 page 157.

¹⁸ *Ibid.*

¹⁹ 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

In other words the same provision applies to child prostitutes as it does to adult prostitutes. A child sex tourism victim therefore, who has sex for reward or commits an act of indecency with another person for reward, commits an illegal act and can be prosecuted in terms of this provision.²⁰ The contents of the controversial section 20(1)(aA) and the arguments as to its proper interpretation and constitutionality therefore need to be expounded upon.

The appellants in *S v Jordan* admitted in the Magistrate's Court that they had acted in contravention of section (20)(1)(aA) and sections 2, 3(b) and 3(c) the Sexual Offences Act 23 of 1957, which provide for the criminalisation of sex for reward and brothel keeping, respectively. However the appellants claimed that the relevant provisions of the Act were unconstitutional. The Magistrate's Court has no constitutional jurisdiction and therefore found the appellants guilty and sentenced them.²¹ An appeal was then made to the Pretoria High Court to have the provisions set aside.

The High Court held that the purpose of section 2 of the Act was to restrict the commercial exploitation of prostitutes and that a third party managing a prostitute with their consent amounts to trafficking in human beings. The High Court added that public disapproval of this kind of exploitation permitted the state to make use of regulations and prohibitions of these practices in order to limit the individual rights of the third parties to freedom of trade, occupation and profession.²² The High Court went on to hold that sections 2, 3(b) and 3(c) of the Act²³ which covered brothel keeping were not unconstitutional.²⁴ This was upheld by the Constitutional Court.²⁵ Therefore brothel keeping provisions of the Sexual Offences Act which can be used to protect child sex tourism victims have passed the constitutionality test.

²⁰ SALC n 14 page 156; The Namibian n 14.

²¹ 656 E-F.

²² 657 E-F.

²³ These provisions read as follows:

“2. Keeping a brothel.- Any person who keeps a brothel shall be guilty of an offence. Certain persons deemed to keep a brothel - The following persons shall for the purposes of section two be deemed to keep a brothel:

(a) ...

(b) any person who manages or assists in the management of any brothel;

(c) any person who knowingly receives the whole or any share of any moneys taken in a brothel.”

²⁴ “Brothel” in terms of section 1 the Act includes:

“‘brothel’ includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any lewd or indecent purpose.”

²⁵ 646 A-C.

In relation to section 20(1)(aA), the High Court found that the distinction made by the provision between the merchant and the customer amounted to unjustified discrimination between not only the sexes but also amongst persons.²⁶ The High Court therefore found section 20(1)(aA) to be unconstitutional²⁷ The declaration of invalidity was then referred to the Constitutional Court for confirmation proceedings and the appeal.

The constitutional challenge to section 20 (1) (aA) included a challenge based on the violation of the rights of gender equality and to equality before the law.²⁸ In deciding whether or not section 20(1)(aA) discriminates unfairly against women, the arguments turned to the construction of the section itself. The State contended that proper construction of the section targets both the prostitute and the customer and hence is not discriminatory. The appellants and *amici* on the other hand were of the belief that it relates only to the prostitute and is therefore discriminatory. Engcobo J was of the view that the section is directed at the prostitute only and not the customer.²⁹ The section makes reference to “any person” who engages in sex for reward. According to Engcobo J, penalising the prostitute alone does not amount to direct discrimination on the basis of gender as clearly the section applies to male prostitutes and female prostitutes alike.³⁰

Engcobo J believes that there exists a qualitative difference between the prostitute who conducts business and is likely to be a repeat offender, and the customer who may or may not repeat the offence. The prostitute is engaged in the business of commercial sex and the purpose of the prohibition is to outlaw commercial sex. Criminal sanction of the conduct of the merchant of commercial sex is thus the means to carry out the purpose of the prohibition. The prostitute sells sex and the patron buys it. Gender is not a differentiating factor at all.³¹

In the dissenting judgment, O’Regan and Sachs J concluded that section 20(1)(aA) amounted to an unjustifiable infringement of section 8(2) of the interim Constitution. They believed that the section, to the extent that it renders criminal the conduct of prostitutes but not that of

²⁶ *S v Jordan and Others* 2002 (1) SA 797 (T) at 800 E.

²⁷ 649 F.

²⁸ 649 F.

²⁹ 650 D-E; see Burchell & Milton “Crimes against Sexual Morality” in *Principles of Criminal Law* (1997) 630, in which they state the following: “It is noteworthy that the section does not penalise the person who gives the reward on return for the sexual intercourse. In short, the prohibition is directed only at prostitutes and not their customers.”

³⁰ 650 E-F.

³¹ 650 G-H.

customers, constitutes unfair discrimination. It is their view that by criminalising primarily the conduct of the prostitute, the law was perpetuating and reinforcing sexual stereotypes which degrade the prostitute and not the client. The law in their belief is fostering social standards which are unconstitutional. They put forth that gender amounted to an integral part of the conduct in question and had a lot to do with the way law enforcement agents deal with the issue.³²

Engcobo J, however, emphasises the fact that a person who pays for sex is guilty of committing a criminal offence and is liable to the same punishment as the prostitute. The customer is guilty in terms of section 18 of the Riotous Assemblies Act³³ and in terms of common law. The purpose of section 20(1)(aA) is to prohibit commercial sex, and not to provide protection for customers. Section 20(1)(aA) of the Sexual Offences Act forms part of the system of law in which all who participate in a prohibited act are guilty of having participated in that act and liable to the same punishment as the principal offender.³⁴ Therefore the man who pays for sex with a woman who receives the payment are both equally guilty of criminal conduct and liable to the same penalties.³⁵

Furthermore, Engcobo J stated that the Sexual Offences Act pursues an important and legitimate purpose and that is to prohibit commercial sex. The arguments why the legislation is important and legitimate are that commercial sex work breeds other social ills such as violence, exploitation and women and children, trafficking in children and the spread of sexually transmitted disease. Whether these ills can be cured by decriminalisation and regulation is a matter for the legislature to decide. The prohibition is gender neutral in that it punishes both males and female prostitutes and the punishment is equal for both the prostitute and the customer. The fact that punishment of the prostitute and the customer are dealt with in terms of different provisions can hardly be said to be unfair.³⁶

Prostitution, according to Engcobo J, is associated with violence, child trafficking and drug abuse and the legislature has the responsibility to combat such social problems and to use

³² 670 A-F.

³³ Act 17 of 1956.

³⁴ 651 F.

³⁵ 651 G.

³⁶ 652 A-B.

criminal sanctions to do so where it deems appropriate.³⁷ It is not the Courts place to pass judgement on the effectiveness of the choice made by the legislature just because there may be better methods of dealing with the problem of prostitution.³⁸

The Constitutional Court therefore declined to confirm the order of the High Court declaring invalid section 20(1)(aA) of the Sexual Offences Act.

The moral judgement against prostitution therefore reigned supreme. What has been made clear from this case is that our constitutional framework not only allows but specifically requires that the legislature enact laws which encompass morality and also that this morality be founded on constitutional values. The fact that the original legislative purpose of the provisions of the Sexual Offences Act is not compatible with our current constitutional standards does not render it unable to serve a legitimate governmental purpose. The Court believes that the source of human rights violations is actually prostitution itself.³⁹ Hence the finding of the Constitutional Court that the provisions of the Sexual Offences Act in question are valid under South African law.

As previously mentioned, this case did not involve children, but nevertheless has ramifications for child prostitutes. Louw believes that the judgement has made a permanent group of marginalised women, i.e. prostitutes of all ages, even more vulnerable because it allows police to declare “open season” on prostitutes.⁴⁰ There is a fear that this will result in increased incidents of police abuse of prostitutes and bribery.⁴¹ The effects that this judgement has on perception and treatment of adult prostitutes by law enforcement officials will in all probability have an impact on child prostitutes which includes victims of child sex tourism as well.

The child prostitute, however, should not be further victimised, traumatised and stigmatized by the criminal justice process. The criminal stigma and marginalisation of child prostitutes needs to be eradicated and replaced by more humane, protective and friendly services so that they feel safe enough to come forward to authorities such as the South African Police Services

³⁷ 654 A.

³⁸ 654 B-E.

³⁹ Kruger “Sex Work from a Feminist Perspective: a Visit to the *Jordan* case” 2004 *SAJHR* 138 149.

⁴⁰ Louw “Specific Crimes: sexual offences” 2002 *SACJ* 376 380; see also Le Roux “Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition” 2003 *SALJ* 452 465.

⁴¹ *Ibid.*

(SAPS) without fear.⁴² What the SALC calls for is the decriminalisation of offences relating to children who are prostitutes and the explicit criminalisation and severe punishment of all the role-players involved in child prostitution.⁴³ The provisions of the Sexual Offences Bill will assist in this regard.⁴⁴

Yet another provision related to child sex tourism is section 10 of the Sexual Offences Act. This section, dealing with procurement or “pimping”, states that an offence is committed by the person who:

- “(a) *procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or*
- (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or*
- (c) procures or attempts to procure any female to become a common prostitute; or*
- (d) procures or attempts to procure any female to become an inmate of a brothel; or applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thins with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female.”*

The purpose of this provision is to save the bodies of women, and particularly young girls from being exploited and to defeat slavery.⁴⁵ The use of the term “female” instead of “person” excludes the prosecution of sexual offences committed against boys or men. A criticism of this section is that the narrow common law understanding of “carnal intercourse” is a man having sex with a woman and not female transgressors having unlawful “carnal intercourse” with other females or males or adult males having sex with boys.⁴⁶ The conduct of facilitators of child sex with female victims is therefore prohibited by this section.

Additionally, the Act stipulates that a person who conspires with another to induce a female by false pretence or fraudulent means to allow a male to have “unlawful carnal intercourse”

⁴² Rakgodi (Secretariat for Safety and Security, Gauteng Province) *Sex Work: Decriminalisation* (2003) 8.

⁴³ SALC *Report on Sexual Offences* Project 107 (December 2002) 81(Available on Internet at www.law.wits.ac.za/salc/salc.html) (Date accessed: 15/05/03).

⁴⁴ To be discussed in paragraph 4.

⁴⁵ Snyman n 4 page 362; Hesselink-Louw, Bezuidenhout & Boniface “South African Law and Child Prostitution: an Overview”2004 *Stell LR* 352 355.

⁴⁶ Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation-South Africa* (August 2000) 77.

with her, commits an offence.⁴⁷ This section does not cater for the situation where a male sexual exploits a male, or a female sexually exploits another female.⁴⁸

Further protection for female victims of child sex tourism is provided for in section 13(1) of the Act, which creates an offence of statutory abduction. It allows for the prosecution of “any person who takes or detains or causes to be taken or detained” any unmarried person under the age of 21 “out of the custody of and against the will” of his or parent or guardian with the intent to have or allow “unlawful carnal intercourse” with the abducted person. The problem with this section is that the “will” relates to the will of the parents and not that of the abducted person.⁴⁹ In other words if a parent allows the “abduction” of his or her child by a child sex tourist, there is no offence committed.

Aside from the provisions on prostitution and abduction, the Act also contains provisions which impact on parents as role players in child sex tourism. In terms of section 9 of the Act, it is an offence for any parent or guardian⁵⁰ of any child under the age of 18 years to “permit, procure or attempt to procure a child to have unlawful carnal intercourse or to commit any immoral or indecent act with any other person than the procurer, or to reside in or to frequent a brothel”.⁵¹ It is also an offence for any parent or guardian of any child to order, permit or in any way assist in bringing about, or to receive any consideration for the defilement, seduction or prostitution of the child.⁵²

Moreover, the Act requires any parent who is aware that his or her child is associating with persons who are prostitutes or who have immoral reputations, to take steps to prevent such association. Should the parent fail to take such steps and the child is defiled, seduced or engages in prostitution, the parent is deemed to have assisted in bringing about the said defilement, seduction and prostitution of the child.⁵³

The SALC believes that creating a separate offence to criminalise the conduct of parents is vital, owing to the inherent duty placed on parents to protect their children and suggests that

⁴⁷ S 11.

⁴⁸ Molo Songololo n 46 page 77.

⁴⁹ *Ibid.*

⁵⁰ The term guardian is defined by S 9(2) of the Act as “any person who has in law or in fact the custody or control of the child”.

⁵¹ S 9(1)(a).

⁵² S 9(1)(b).

⁵³ S 9 (1)(A).

an offence in this regard be met with severe punishment.⁵⁴ Currently, any person convicted in terms of section 9(1) is liable to imprisonment not exceeding 5 years, or if the child is a girl under the age of twelve or a boy under the age of fourteen, to life imprisonment.

The Sexual Offences Act impacts on the conduct of various role-players in child sex tourism. However, there are no provisions related to child sex tourism specifically. On the issue of child sex tourism, there are still many situations that are not adequately provided for by the Act and others that are not provided for at all, leaving much room for improvement. The deficiencies of the current sexual offences legislation and recommendations for improvement are elaborated on in the discussion of the Sexual Offences Bill in paragraph 4 of this chapter.

3. COMMON LAW

In addition to the Sexual Offences Act, certain common crimes also have an effect on child sex tourism. Common law consists of those rules of law not embodied in legislation.⁵⁵ The history of South African law reveals that certain crimes have existed since the earliest times and have been punished in the legal systems which are sources of modern South African law. These common law crimes exist in South African law by reason of the fact that they exist as crimes in these sources. Judges, as the interpreters and expounders of the law, had the task of creating new common law simply by pronouncing it. This is no longer possible as South Africa has emerged as a modern parliamentary state and the law making power now vests in the legislature.⁵⁶ The result is that the list of common law crimes is now closed. The only manner in which a crime can be created now is by enactment through the legislation. However, South African common law which is in existence, defines all the serious crimes against the person, property and interests of the state.⁵⁷

There is no common law crime relating specifically to the abuse of children, sexual or otherwise. Abuse of children is dealt with as it is for adults and is actionable if it complies with the requirements for a crime. Indecent assault, rape, abduction and kidnapping are the

⁵⁴ SALC n 14 page 155.

⁵⁵ Snyman n 4 page 8.

⁵⁶ Burchell n 4 page 54.

⁵⁷ Burchell & Milton n 29 page 28.

common law crimes which most affect children.⁵⁸ Each of these will now be discussed in relation to their impact on child sex tourism cases.

3.1 INDECENT ASSAULT

Most effective is the common law crime of indecent assault which protects both male and female victims of child sex tourism from a wide range of sexual encounters with male or female child sex tourists.

Indecent assault consists of unlawfully and intentionally touching or handling another in circumstances in which either the act itself or the intention with which it is committed is indecent.⁵⁹ It is a generic crime encompassing most forms of unlawful sexual encounters with the exclusion of rape. This would include for example the touching or fondling of a person in a sexual way, masturbation, kissing, the act of inserting an object (other than a penis) into the vagina and other forms of failed sexual intercourse.⁶⁰ The crime can be committed against females or males.⁶¹ The offence therefore impacts on male or female child sex tourists who commit indecent acts falling short of sexual intercourse with any child.

Consent rids the act of its criminal nature. However, consent may be restricted by a lack of capacity to consent, for example, a girl under the age of 12 years is irrebuttably presumed to be incapable of consent to sexual intercourse⁶² and the same is true of a boy under the age of 7 years.⁶³ Therefore victims of child sex tourism falling into these age groups are protected by the law regardless of consent. Consent may be restricted by fraud or duress,⁶⁴ therefore child sex tourist victims who are forced into consenting will nevertheless be protected by the law.

Essentially, the crime of indecent assault is a flexible and dynamic offence which covers a broad range of acts. It is a competent verdict for a number of offences and is a gender-neutral provision. This means that the crime of indecent assault is used as a “catch-net” in cases

⁵⁸ Webster *The Protection of Children from Violence* (July 2001), Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England, September 2001.

⁵⁹ Burchell n 4 page 691.

⁶⁰ *Ibid* pages 691-693.

⁶¹ Snyman n 4 page 438.

⁶² *R v Soucout Ally* 1907 TS 338.

⁶³ Burchell n 4 page 694.

⁶⁴ *Ibid*.

where it is not possible to prosecute someone under the statutory offences contained in legislation,⁶⁵ as was illustrated in the Zimmerman case.

Zimmerman, as mentioned above, was arrested on suspicion of contravening section 14 of the Sexual Offences Act as well as section 50(A) of the Child Care Act,⁶⁶ dealing with sexual encounters with underage persons and the commercial exploitation of children respectively.⁶⁷ However, Zimmerman admitted only to “masturbating” the boy,⁶⁸ and the boy was already back on the streets and unavailable to testify against him.⁶⁹ Zimmerman therefore pleaded guilty to a charge of indecent assault, after striking a plea bargain agreement⁷⁰ with the state. The only other option according to the NPA would have been to withdraw the charges against him.⁷¹ The common law offence of indecent assault therefore assured the conviction of a child sex tourist who would have otherwise slipped through the cracks. The effectiveness of such an offence must be noted despite the fine of R10 000 which was given in this particular case.

3.2 RAPE

Also effective, but with a narrower scope, is the common law offence of rape which is confined to protecting only female victims of child sex tourism from sexual penetration by male child sex tourists.

Rape consists of unlawful intentional sexual intercourse with a woman without her consent.⁷² The crime is committed by the penetration of the woman’s vagina by the male’s penis. No other form of sexual interaction constitutes rape. Rape can only be committed in respect of a human female who is alive. Women therefore cannot commit the crime of rape. Even though intercourse with a male without his consent is just as reprehensible as heterosexual rape, the

⁶⁵ SALC n 43 page 90.

⁶⁶ To be discussed in Chapter 4, par 4.

⁶⁷ Sapa n 11.

⁶⁸ Molwedi “Swiss sex tourist 'traumatised' by case, court told” 30 November 2005 Cape Times.

⁶⁹ Motloun “NPA defends ‘sex tourist’ plea bargain” 30 November 2005, 01:14 at <http://www.mg.co.za> (i.e Mail & Guardian Online) (Date accessed 27/01/06).

⁷⁰ S 105 A of the Criminal Procedure Act 51 of 1977 sets out a plea bargain agreement procedure. In terms of this provision, negotiated agreements between the prosecution and defence with regard to plea and sentence can be reached as long as certain formal requirements are met. This is part of accepted practice in South Africa.

⁷¹ Motloun n 69.

⁷² Burchell n 4 page 699.

common law does not recognize such an act as rape.⁷³ According to Burchell, the existing common law definition of rape needs to be revised in terms of Constitutional values as the current definition is not gender neutral and does not include all forms of penetration.⁷⁴ This crime applies to the male child sex tourist who has unlawful intentional sexual intercourse with a female child. Hence a sex tourist like Zimmerman cannot be charged with rape.

The crime of rape can only be committed if the women's consent to intercourse is absent.⁷⁵ However, a girl under the age of 12 years is irrebuttably presumed to be incapable of consent to sexual intercourse.⁷⁶ Even though a girl of that age may in fact understand the nature of the act, this fiction is applied on the grounds of public policy.⁷⁷ Therefore, a male child sex tourist who has sex with a girl under the age of 12 can be charged with rape irrespective of whether the girl consented or not.

3.3 ABDUCTION

The common law offence of abduction involves the unlawful removal of a minor out of the control of his/her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor.⁷⁸ This crime therefore impacts on the actions of "pimps" or child sex tourists of both sexes.

In effect the crime is committed against the parents or guardians of the minor, and not against the minor child. Consent of the parent or guardian is a ground of justification for the removal.⁷⁹ If the guardian consents, but the minor does not, there may be a crime of kidnapping, rape or assault but not abduction.⁸⁰

Another important point is that the crime is committed irrespective of whether the minor is physically removed by force, or by request of the wrongdoer, or the minor leaves

⁷³ The reasons for this are historical. Rape originates from laws which regulated the marriage of females and has evolved as a crime committed against females. See Burchell n 4 pages 706-707.

⁷⁴ *Ibid* 716.

⁷⁵ Snyman n 4 page 447.

⁷⁶ *R v Z [204] 1960 (1) SA 739 (A)* at 742, 744.

⁷⁷ Burchell n 4 page 709.

⁷⁸ Sexual Offences and Community Affairs (SOCA) Unit, National Prosecuting Authority *Current South African Legislative Framework in Relation to the Trafficking in Persons International Instruments*, supplied by Advocate Nolwandle Qaba in 2005.

⁷⁹ Snyman n 4 page 373.

⁸⁰ Burchell n 4 page 764.

voluntarily.⁸¹ This means that child sex tourist victims who are enticed into leaving on their own accord are nevertheless protected.

It is accepted that an abductee may be male but there are no reported cases of this. If it is a crime to abduct a male for heterosexual sex, it should also be a crime to abduct him for homosexual sex as well.⁸² A male victim of child sex tourism, as in Zimmerman's case, could also be protected by this common law offence.

3.4 KIDNAPPING

Also related to the unlawful removal of a child is the crime of kidnapping. Kidnapping consists of unlawfully and intentionally depriving a person of liberty of movement and/or, if such person is a child, his or her custodians of their control over him or her.⁸³ It is thus a crime committed against a person's freedom of movement.⁸⁴

In relation to the wrongdoer, "a person" may be a man or a woman or a child. In terms of the definition of the offence, a parent cannot commit the crime of kidnapping in respect of his or her own child.⁸⁵ This offence can be committed by the "pimp", a person who facilitates sex with a child or a child sex tourist who deprives a child of his or her freedom of movement.

The motivation for kidnapping varies. It may take place for economic (slavery), financial (ransom) or even emotional (romantic infatuation) reasons.⁸⁶ The act of deprivation may involve physically carrying a person off, imprisoning the person or enticing them away by craft or cunning or some other act.⁸⁷ Kidnapping has certainly increased in modern society and attracts increasingly severe punishment and therefore could be very useful in child sex tourism cases.⁸⁸

⁸¹ Snyman n 4 page 372.

⁸² Burchell n 4 page 766.

⁸³ Snyman n 4 page 462.

⁸⁴ Section 12 (1) of Act 108 of 1996.

⁸⁵ Snyman n 4 pages 461-462.

⁸⁶ Burchell & Milton n 29 page 4.

⁸⁷ Burchell n 4 page 521.

⁸⁸ Milton & Hunt *South African Criminal Law and Procedure* (1996) 549.

4. SEXUAL OFFENCES BILL

4.1 BACKGROUND

In 1994, the South African President, Nelson Mandela, and his Cabinet set in motion a process to ensure that South African children were included in the process of reconstruction and development. The process was aimed at fulfilling South Africa's obligations in terms of the United Nations Convention on the Rights of the Child.⁸⁹ They established the National Steering Committee on the Development of a National Plan of Action for the Children of South Africa (the NPA).⁹⁰ On 31 May 1996, Cabinet endorsed and set in motion a National Programme of Action for Children in South Africa.⁹¹ An essential component of this process was a thorough examination of existing child protection legislation and the drafting of new and more effective legislation. The Minister of Justice directed the SALC to conduct an investigation into sexual offences against children, to elicit responses from interested parties on the various issues and to make recommendations on legislative reform on the basis of its findings.⁹²

As a result of its investigation, the SALC compiled a number of Reports and Papers on Sexual Offences⁹³ containing critical analyses of the current law, responses from interested parties, as well as innovative and progressive recommendations regarding changes to the criminal justice system.

In its Report on Sexual Offences against Children, the SALC made an assessment of the role that criminal law should play in dealing with the sexual exploitation of children. The SALC criticised the criminal justice system for not paying attention to the needs of the victim and for focusing on punishment rather than the treatment or rehabilitation of the perpetrator. Another criticism is that government relies on the criminal law as a response to sexual abuse instead of developing measures to prevent sexual abuse. Despite these drawbacks, the SALC is of the

⁸⁹ SALC *Sexual Offences against Children* Issue Paper 10, Project 108 (May 1997) 1. This Report contains the Commission's preliminary recommendations.

⁹⁰ The steering committee consisted of the Directors-General of the Departments of Health, Welfare, Education, Finance, Foreign Affairs, Justice and the Reconstruction and Development Programme.

⁹¹ SALC n 89 page 1.

⁹² The Minister of Justice approved the inclusion of the investigation in the Commission's programme on 13 April 1996.

⁹³ SALC n 43; SALC n 14; SALC n 89.

belief that the criminal justice system “must continue to be a central element in the community’s response to child sexual abuse”.⁹⁴

In December 2002, the SALC released its joint Report on Sexual Offences dealing with both substantive and procedural law on sexual offences. The Report contains the SALC’s final recommendations for a draft Bill on Sexual Offences.⁹⁵ The Sexual Offences Bill⁹⁶ was tabled before Parliament on 26 August 2003. Public hearings on the Bill were called by the Parliamentary Portfolio Committee on Justice and Constitutional Development in September 2003. Since then the Bill has undergone extensive re-drafting.⁹⁷ On 3rd May 2006, the Deputy Minister of Justice and Constitutional Development, Advocate de Lange announced that the latest version of the Sexual Offences Bill⁹⁸ has been approved by Cabinet.⁹⁹ After a process of public participation, the Bill will be submitted to Parliament for finalisation.¹⁰⁰

Once the Sexual Offences Bill is enacted, numerous sections of the Sexual Offences Act¹⁰¹ as well as certain common law offences will be repealed.¹⁰² However, it will take some time for regulations¹⁰³ to be made in order to enforce the provisions of the Bill¹⁰⁴ and until then, the provisions of the Sexual Offences Act and common law will continue to apply. Furthermore, the Bill states that despite the repeal of any provision of any law by the Bill, such provision will remain in force as if it had not been repealed in order to dispose of any investigation, prosecution or any legal proceedings instituted before the commencement of the Bill and that has not yet been concluded at the commencement of the Bill.¹⁰⁵

⁹⁴ SALC n 89 page 23.

⁹⁵ SALC n 43 page 3.

⁹⁶ Bill 50 of 2003.

⁹⁷ Van Niekerk *The Latest Version of the Criminal Law (Sexual Offences) Bill* (May 2006).

⁹⁸ N 3.

⁹⁹ Van Niekerk n 97; Rank “Sex Bill’s approval welcomed by NGO’s” 5 May 2006 *The Herald*.

¹⁰⁰ See Bills before Committees of the National Assembly at www.pmg.org.za (Date accessed: 31/08/2006).

¹⁰¹ S 9,11,13,14,15,18,18A and 20A.

¹⁰² S 63 of Bill B-2006.

¹⁰³ Sometimes legislation may require certain actions to be taken by the Department before it can be implemented, for instance regulations may have to be prepared and promulgated to further regulate aspects in terms of the legislation. In such instances the Act comes into operation on a date determined by the President by proclamation in the *Gazette*. See Department of Justice and Constitutional Development “The Legislative Process” at www.doj.gov.za/2004dojsite/legislation/legprocess.htm (Date accessed: 14/06/06).

¹⁰⁴ S 62 of Bill B-2006 makes provision for the passing of regulations for the inter-sectoral implementation of the Bill.

¹⁰⁵ S 64 (3).

4.2 OBJECTS AND PURPOSE OF THE BILL

The Sexual Offences Bill is the embodiment of the SALC's attempt to "synthesize the theory and practical reality facing victims of sexual offences into workable and enforceable legislative and non-legislative reforms that will protect victims of sexual violence."¹⁰⁶ It redefines sexual crimes against adults and children and also reforms procedures for the management of sexual offences. The intention of the Bill is to encourage victims to report offences and improve the experience of victims within the criminal justice system, while giving due regard to the rights of the alleged perpetrators.¹⁰⁷

Fundamentally, the objects of the Sexual Offences Bill are to criminalise all forms of sexual exploitation. The SALC, during its investigation, critically analysed the issue of commercial sexual exploitation and decided to incorporate provisions criminalising this conduct in the new Sexual Offences Bill and not in the new Children's Act, as the latter focuses on the protection of children rather than on the prosecution of offenders.¹⁰⁸

The Bill repeals some of the common law sexual offences related to child sex tourism and replaces them with new gender-neutral provisions, as in the case of rape.¹⁰⁹ Furthermore the Bill creates new sexual offences related to children which are the same or similar to sexual offences being perpetrated against adults. Amongst these new offences is the prohibition of the participation in and facilitation of child sex tours.¹¹⁰ The Bill also aims to prevent secondary victimisation of complainants of sexual offences by the criminal justice system¹¹¹ and ultimately to provide all complainants of sexual offences with "the maximum and least traumatizing protection" that the legal system can provide.¹¹²

Most extraordinary is the fact that the Sexual Offences Bill contains a chapter specifically dedicated to sexual offences against children.¹¹³ The creation of separate offences related to

¹⁰⁶ SALC n 43 pages 4-5.

¹⁰⁷ Artz & Combrink "'A wall or words': Redefining the offence of rape in South African Law" 2003 *Acta Juridica* 72 73.

¹⁰⁸ SALC *Report on the Review of the Child Care Act* Project 110 (December 2002) 187 (Available on Internet at www.law.wits.ac.za/salc/salc.html) (Date accessed: 15/05/03).

¹⁰⁹ S 2(b).

¹¹⁰ S 16(6).

¹¹¹ S 2 (c).

¹¹² S 2.

¹¹³ Chapter 3.

children addresses the particular vulnerability of children to sexual abuse or exploitation.¹¹⁴ It is necessary to delve into not only those provisions of the Sexual Offences Bill which deal with child sex tourism directly but also the related provisions which may be utilised in a child sex tourism cases. It is also necessary to ascertain which of the role-players in child sex tourism are affected by each of these provisions.

4.3 CHILD SEX TOURISM

Undoubtedly, the most noteworthy provisions are those which expressly prohibit child sex tourism. Child sex tourism is recognised by the SALC as a relatively recent phenomenon, which is not at all addressed by current legislation.¹¹⁵ The SALC firmly believes that sex tourism should be criminalised. Its suggestion of including a provision which criminalises child sex tourism in the Sexual Offences Bill was supported by all respondents. In fact, the SALC was lauded by the respondents for its progressive approach in addressing this issue.¹¹⁶

The issue of child sex tourism is dealt with under the umbrella of “sexual offences against children”. In terms section 16(6) of the Bill, the organisation of child sex tours is specifically prohibited. This provision criminalises the actions of both natural persons and juristic persons that facilitate child sex tours within or to South Africa in any way, by making travel arrangements¹¹⁷ for potential perpetrators, whether they are residing within South Africa or not. Also criminalised is the act of printing or publishing information to promote or facilitate child sex tours.¹¹⁸ These provisions impact specifically on the facilitators of child sex tours.

Another praiseworthy inclusion in the Bill, are the provisions on the sexual grooming which relate directly to child sex tourism. During its investigation, the SALC’s attention was drawn to the practice by sexual offenders of “grooming” a child prior to commission of a sexual offence¹¹⁹ with such child by way of the display of sex articles to the child. The SALC

¹¹⁴ Introduction preceding the preamble to the Bill.

¹¹⁵ SALC n 43 page 39.

¹¹⁶ *Ibid* page 81.

¹¹⁷ S 16(6)(a).

¹¹⁸ S 16(6)(b).

¹¹⁹ See Commission on Human Rights *Rights of the Child*, a Report submitted by Mr. Juan Miguel Petit, Special Rapporteur on the sale of children, child prostitution and child pornography (23 December 2004) for further information on the use of child pornography in the “grooming” process.

believes that children deserve legislative protection against this behaviour and therefore recommended the inclusion of a provision prohibiting sexual grooming.¹²⁰

Innovatively, the Bill creates the crime of “sexual grooming” of children which makes it an offence for a person who, after meeting or communicating with a child from, to or in any part of the world on at least two previous occasions, travels to meet such child for the purpose of committing a sexual act with the child;¹²¹ or arranges or facilitates a meeting with a child for the purpose of committing a sexual act with a child.¹²² These provisions apply directly to child sex tourists.

Also included in the offence of sexual grooming of children is conduct whereby a person manufactures or distributes an article that promotes or is intended to be used in a sexual act¹²³ with a child or supplies or displays to a child an article which is intended to be used in the performance of a sexual act.¹²⁴ This type of conduct is often employed by child sex tourists in the process of luring child victims.

4.4 CHILD TRAFFICKING

Closely related to the provisions of child sex tourism are those on trafficking in children for the purposes of sexual exploitation. With regard to the issue of trafficking in children, the SALC was of the opinion that specific trafficking legislation should be enacted in order to deal with all aspects of the problem. It recommended that a separate investigation on human trafficking be carried out by them in order to do away with the current “piecemeal legislative approach”.¹²⁵ This investigation has taken place and during 2004 the SALC released its Report on Trafficking in Persons, which refers to South Africa’s international obligations with regard to the issue of trafficking, the current substantive law on trafficking and the recommendations made with respect to legislative reform in this area of the law¹²⁶ in the Reports on Sexual Offences and the Report of the Review of the Child Care Act.¹²⁷

¹²⁰ SALC n 43 page 299.

¹²¹ S 17(c).

¹²² S 17(d).

¹²³ S 17(a).

¹²⁴ S 17(b).

¹²⁵ SALC n 43 page 81.

¹²⁶ See SALC *Trafficking in Persons* Issue Paper 25, Project 131 (March 2004).

¹²⁷ To be dealt with in chapter 4, par 6.

The Bill encompasses the above recommendations by stating that until such time as specific trafficking legislation is adopted in compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons,¹²⁸ the provisions in the Bill relating to the trafficking in persons for sexual purposes will be provisionally applied in partial compliance of South Africa's international obligations.¹²⁹ These provisions are included under general provisions in the Bill¹³⁰ and therefore apply to adults and children alike.

The offence of trafficking includes: supplying, recruiting, removing, transporting, harbouring, selling, disposing of or receiving persons within or across the borders of South Africa. This conduct constitutes trafficking whether it takes place by abduction,¹³¹ deception¹³² or by the giving or receiving of payments for the purpose of "sexual exploitation, grooming or abuse of such person," including for the purpose of committing a sexual offence, sexual act, or "exploitation for purposes of pornography or prostitution, with, against or of such person".¹³³

Most significant is the provision that prohibits trafficking in persons for the purposes of sexual exploitation both within and across South African borders.¹³⁴ Any person who traffics another without their consent is guilty of an offence. Consent is regarded as being absent where the victim of trafficking is a child.¹³⁵ In terms of the Bill, any person who orders, organises or directs trafficking; performs an act which encourages or promotes trafficking; or encourages or procures another person to commit trafficking, commits an offence.¹³⁶ Importantly, victims of trafficking are exempted from standing trial for contravention of immigration or prostitution laws as a result of such trafficking,¹³⁷ thereby eliminating the secondary victimisation of children who are victims of trafficking.

Furthermore, the Bill also covers acts which facilitate child trafficking by making it an offence to own, lease, rent, manage or have control over any movable or immovable property used in the commission of sexual offences with children.¹³⁸ This provision improves on

¹²⁸ Discussed in chapter 1.

¹²⁹ S 65(1).

¹³⁰ Chapter 7 Part 5.

¹³¹ S 65(2)(b)(c).

¹³² S 65(2)(b)(e).

¹³³ S 65(2)(b)(g).

¹³⁴ S 66(1).

¹³⁵ S 66(3)(b)(vi).

¹³⁶ S 66(4).

¹³⁷ S 66(5).

¹³⁸ S 16(2)(b).

section 50A of the Child Care Act which does not specifically include movable property in its provisions, as will be discussed in chapter 4 of the dissertation. The Bill also covers offences related to trafficking, such as detaining a child by force, deception or abuse of power for purposes of the commission indecent acts or acts of penetration with the child by any person.¹³⁹

The trafficking provisions contained in the Sexual Offences Bill impact tremendously on the conduct of the facilitators of child sex and on child sex tourists themselves.

4.5 CHILD PROSTITUTION

A further serious problem addressed by the Bill is that of child prostitution. In this regard, the SALC emphasised that a child prostitute is a “child in need of care” and should not be treated as a criminal. The SALC stressed the need for an offence which criminalises child prostitution without criminalising the actions of the child prostitute. The full force of the criminal law should be used to prosecute the customer, pimp, procurer and parents or guardians who intentionally cause children to participate in child prostitution. There is a need to adopt a holistic approach to the problem of child prostitution by adopting measures to address the socio-economic circumstances of child prostitutes. It is the SALC’s opinion that, with public intervention and assistance from non-governmental organisations, the problem can be curtailed.¹⁴⁰

In addition, the SALC raised the issue of excluding certain children from prosecution despite the fact that they are receiving consideration from child prostitution or living off or benefiting from the earnings obtained from child prostitution.¹⁴¹ This would provide for the situation where a child in a child-headed household engages in prostitution in order to support his or her siblings. The SALC initially proposed that children below the age of 15 years be exempted from prosecution. The rationale behind this proposal was that children younger than 15 are prohibited from being employed by the Basic Conditions of Employment Act.¹⁴² A number of respondents argued for the age to be raised to 18 years in order to protect all children. In the light of the current economic position and the rarity of gainful employment

¹³⁹ S 16 (1)(e).

¹⁴⁰ SALC n 43 pages 75-76; see discussion in Hesslink-Louw *et al* n 45 pages 354.

¹⁴¹ SALC n 43 page 81.

¹⁴² S 43(1)(a) of Act 75 of 1997.

that is suitable for children, the SALC conceded that the age of exemption should be lifted to 18 years.¹⁴³

In summary, the SALC recommended the following: that a complete ban be placed on child prostitution and anyone involved in the sexual exploitation of a child, whether as a pimp or customer, should face severe criminal sanction; that the child prostitute should be regarded as a victim in need of care and protection and should not be prosecuted; and that living off or benefiting from the earnings of child prostitution should be penalised with an exemption from liability for persons under 18 years of age.¹⁴⁴

The Sexual Offences Bill embodies the explicit criminalisation and severe penalisation of the role-players involved in child prostitution under the umbrella of “sexual offences against children.”¹⁴⁵ It targets customers, pimps, brothel-keepers and all other role-players involved in commercial sexual exploitation of children.¹⁴⁶

Most importantly, the Bill makes it an offence for any person to commit a sexual act with a child; to invite, persuade or induce another to commit such an act with a child; to promote or encourage or facilitate sex with a child; to make available, offer or engage a child for purposes of the commission of a sexual act with such child by any person; or to detain a child by force, deception or abuse of power for purposes of the commission of indecent acts or acts of penetration with the child by any person.¹⁴⁷ In addition, the Bill targets pimps by stating that any person who intentionally receives a reward, financial or otherwise from the commission of a sexual act with a child is guilty of benefiting from the sexual exploitation of a child.¹⁴⁸ These provisions apply to child sex tourists, pimps or other facilitators of child sex.

Furthermore, it is also an offence for any person to intentionally live off the earnings acquired from the sexual exploitation of a child.¹⁴⁹ The Bill expressly exempts children from liability

¹⁴³ SALC n 43 page 81.

¹⁴⁴ *Ibid* page 85.

¹⁴⁵ Chapter 3.

¹⁴⁶ SALC “Press Statement: South African Law Commission: Project 107: Sexual Offences” at http://www.doj.gov.za/m/statements/2003/2003_01_21.2.sale (Date accessed: 4/04/04).

¹⁴⁷ S 16 (1).

¹⁴⁸ S 16 (4).

¹⁴⁹ S 16 (5).

for these offences,¹⁵⁰ thus complying with the recommendations of the SALC mentioned above.

Owing to the inherent duty of parents to protect their children, the Sexual Offences Bill contains a separate offence criminalising the conduct of parents whose children are being sexually exploited. It is an offence for the parent, guardian or care-giver of a child to allow or knowingly permit the commission of a sexual act with the child by any person.¹⁵¹

The Bill criminalizes the act of brothel-keeping. This includes owning, leasing, renting, managing, occupying or controlling any movable or immovable property used for purposes of the commission of a sexual act with such child by any person.¹⁵² Also, any person who has knowledge of the sexual exploitation of a child and fails to report it to the police within a reasonable time of acquiring such knowledge, commits an offence.¹⁵³

On the whole, the provisions on child prostitution contained in the Sexual Offences Bill comprehensively cover the conduct of various role players in child sex tourism.

4.6 CONSENSUAL RAPE

Equally important are the provisions in the Bill related to child rape. Following the recommendations of the SALC, the Sexual Offences Bill codified the common law offence of rape but introduced a number of changes to the definition of the crime. In terms of the common law, rape has to be committed personally and is not gender-neutral.¹⁵⁴ The Bill removes both these requirements from the definition of rape.

Section 14 states any person who commits an act of sexual penetration with a child despite his or her consent is guilty of the offence of consensual rape.¹⁵⁵ Sexual penetration includes:

“any act which causes penetration to any extent whatsoever by–

¹⁵⁰ S 53 (4)(a).

¹⁵¹ S 16 (2)(a).

¹⁵² S 16 (2)(b).

¹⁵³ S 16(3).

¹⁵⁴ Burchell n 4 pages 718-720.

¹⁵⁵ S 14(1).

- (a) *the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
- (b) *any other part of the body of one person or, any object, including any part of the body of an animal or any object resembling the genital organs of a person or an animal, into or beyond the genital organs or anus of another person; or*
- (c) *the genital organs of an animal, into or beyond the mouth of another person.”*¹⁵⁶

Personal intercourse was therefore not a requirement. Any act which causes the penetration of another would suffice.

Other positive changes to the new definition are that anal penetration is included as rape, meaning that males can be victims of rape. Moreover the provisions related to rape are gender-neutral, meaning that both men and women can be guilty of the crime of rape.¹⁵⁷ This broadening of the definition of rape may increase victims’ access to the criminal justice system and indirectly provide more suitable redress for the offence.¹⁵⁸ It will serve to protect both male and female child sex tourist victims from acts of sexual penetration. A sex tourist like Zimmerman could therefore be prosecuted for rape in terms of the Bill.

The 2003 version of the Sexual Offences Bill created two offences related to rape: Firstly, “sexual violation” which entails the unlawful and intentional use of an object to penetrate a person’s anus or genital organs¹⁵⁹ and secondly, “oral genital sexual violation” relating to the penetration of person’s mouth by a person or animal’s genital organs.¹⁶⁰ There was a reluctance to include these offences under the definition of rape because it would mean that perpetrators of less serious forms of penetration, e.g. slight digital penetration of a victim’s genital organs, would be labelled as “rapists”.¹⁶¹

The 2006 Bill avoids referring to “sexual violation” and “oral genital sexual violation” and defines this conduct as sexual penetration and therefore rape. This marks a positive change because this form of conduct is very often just as invasive, if not more so than penile-vaginal penetration. The adoption of a broad definition of penetration also highlights the violent

¹⁵⁶ S 1.

¹⁵⁷ See Artz & Combrink n 107 page 73, which argues that although the objective of this provision is laudable, upon closer scrutiny, it does not achieve its aim because of the physiological impossibility of a woman to commit “an act that causes penetration by a genital organ into or beyond the anus or genital organs of another person”.

¹⁵⁸ Pantazis “Notes on male rape” 1999 (12) SACJ 369 370.

¹⁵⁹ S 3 of Bill 50 of 2003.

¹⁶⁰ S 4 of Bill 50 of 2003.

¹⁶¹ Artz & Combrink n 107 page 83.

nature of the crime of rape as well as emphasising a gender-neutral approach to dealing with the offence.¹⁶²

The common law offence of rape is repealed by the Bill. However, any criminal proceedings relating to rape which are instituted and not finalised before the commencement of the Bill must be continued as if the Bill has not been passed.¹⁶³

Despite any issues that may be raised about the redefinition of the offence of rape or the appropriate wording of the above provisions, the proposals in Bill are in principle a progressive development of the common law.

4.7 CONSENSUAL SEXUAL ASSAULT

Yet another useful provision in relation to child sex tourism is section 15 of the Bill which prohibits acts of “sexual violation” with a child despite his or her consent.¹⁶⁴ “Sexual violation” with respect to children covers a broad range of acts falling short of sexual penetration such as direct or indirect contact between the genital organs, anus or mouth of a person or animal with the genital organs, anus or mouth of a child and the masturbation of a child.¹⁶⁵

In other words, the Bill codifies and replaces the common law offence of indecent assault.¹⁶⁶ Same as with rape, any criminal proceedings relating to indecent assault which are instituted and not finalised before the commencement of the Bill must be continued as if the Bill has not been passed.¹⁶⁷

Significantly, section 15 can be used to prosecute child sex tourists in cases like Zimmerman’s, where either sexual penetration did not take place or cannot be proven. It could perform a useful “catch-net” function in child sex tourist cases.

¹⁶² Burchell n 4 page 719.

¹⁶³ S 64.

¹⁶⁴ S 15(1).

¹⁶⁵ S 1.

¹⁶⁶ S 63.

¹⁶⁷ S 64.

4.8 EXPOSURE TO PORNOGRAPHY AND FLASHING

Less significant, but nevertheless related to child sex tourism, are the provisions prohibiting exposure to pornography and flashing.

The Bill makes it an offence for a person to cause the exposure or display of pornography to child,¹⁶⁸ which could occur during the grooming process, particularly by predators who lure children via the Internet. This strengthens the provisions focusing on the display of pornography to a child provided for in the Films and Publications Act.¹⁶⁹

In addition, the Bill creates the offence of “flashing”, which entails the intentional exposure or display of the genital organs, anus or breasts to a child with or without the child’s consent.¹⁷⁰

The introduction of these new offences provides extra protection for children from less severe forms of sexual exploitation which could come into play in cases of child sex tourism.

4.9 NATIONAL REGISTER OF SEX OFFENDERS

Notably, the Bill makes provision for the establishment of a National Register of Sex Offenders within six months of the commencement of the Bill.¹⁷¹ The purpose of the Register is to provide a record of persons convicted of sexual offences against children before or after the commencement of the Bill, whether committed in South Africa or not.¹⁷² The particulars of convicted child sex tourists from all parts of the world will therefore be recorded in the Register. The Register will contain not only the names of convicted sex offenders but also their last known address, identity numbers and the offence for which they were convicted.¹⁷³

In support of this, the Bill provides that a person who has been convicted of a sexual offence against a child and whose name has been recorded in the National Register of Sex Offenders, is prohibited from working with children “in circumstances which place him or her in a position of authority, supervision or care of a child or children or of gaining access to a child

¹⁶⁸ S 22.

¹⁶⁹ Act 65 of 1996, to be discussed in chapter 5, par 5.

¹⁷⁰ S 21.

¹⁷¹ S 44(1).

¹⁷² S 45(a).

¹⁷³ S 46(b).

or children.”¹⁷⁴ This will prevent convicted child sex tourists from gaining further access to children that they could possibly exploit.

In addition any person convicted of committing a sexual offence with a child who is seeking such employment is compelled to disclose such conviction at the time of applying or being placed in a position applied for, regardless of whether or not his or her name appears in the register.¹⁷⁵ A person who contravenes section 43 is liable on conviction to a fine or to imprisonment for a period not exceeding seven years or both.¹⁷⁶

The manner in which the Register will be utilized is that an application may be made by certain persons for a prescribed certificate confirming whether or not a particular person’s name appears in the Register. Such application may be made by, amongst others:

- i) persons who manage or operate child and youth care centres;¹⁷⁷
- ii) persons in a position of authority or supervision over or care of a child or children, or allowing or granting access to a child or children;¹⁷⁸
- iii) persons who works with or have access to children at an institution providing welfare services to children;¹⁷⁹ or
- iv) the National Commissioner of the SAPS.¹⁸⁰

In this way, persons in a position of authority, supervision or care of a child will be able to ascertain whether or not another person or potential employee is a convicted child sex offender and ensure that they are not given access to children.

¹⁷⁴ S 43 (1).

¹⁷⁵ S 43 (3).

¹⁷⁶ S 43 (4).

¹⁷⁷ S 49 (a)(i).

¹⁷⁸ S 49 (c).

¹⁷⁹ S 49 (a)(ii).

¹⁸⁰ S 49 (b).

4.10 EXTRATERRITORIALITY

Ultimately, every child has the right to protection from sexual abuse, regardless of which part of the world they live in. Extraterritorial jurisdiction is a powerful tool in ensuring this protection. Although it is not a "cure" for the problem of child sex tourism, it is a vital mechanism in a broader plan of eradication of the problem¹⁸¹ as it ensures that states do not become safe-havens for sex offenders.¹⁸²

The SALC stressed the need for increased protection from sexual offences both locally and globally. It recommended the extraterritorial application of the provisions of the Sexual Offences Bill in order to hold accountable those South African nationals who commit sexual offences abroad.¹⁸³

Furthermore, the SALC noted that extraterritorial jurisdiction is receiving considerable attention from lawmakers in other countries in the fields of sex tourism, trafficking of persons and child pornography. It emphasised that extraterritorial laws are not a replacement for effective national legislation and should be used as a measure of last and not first resort. The SALC accepts that there are a number of practical difficulties in its application, but believes that making provision for extraterritorial jurisdiction will serve as a very useful preventative and "safety-net" measure against sexual offences.¹⁸⁴ The SALC believes that child sex tourism can only be dealt with effectively once effective national legislation relating to commercial sexual exploitation is enacted which allows for the extraterritorial application of its provisions.¹⁸⁵

As a result of the above recommendations and in keeping with international standards, the Sexual Offences Bill boldly introduces a section allowing for the extraterritorial application of the provisions contained therein. The Bill states that a court of the Republic has jurisdiction over every sexual offence contained in the Bill which occurs outside South African borders, if

¹⁸¹ Seabrook *No hiding Place: Child Sex Tourism and the Role of Extra-territorial Legislation* (2000) xiv; Van Bueren *Child Exploitation and the Law: A Report on the International Legal Framework and Current Legislative and Enforcement Responses* 16; Muntarbhorn *Extraterritorial Criminal Laws Against Child Sexual Exploitation* (1998).

¹⁸² Swindell for the 2001 Free our Women Campaign: "Child sex trafficking on Rise in Africa" at <http://www.midnottsol.org/fow/r004.html> (Date accessed:21/02/03).

¹⁸³ SALC n 43 page 286.

¹⁸⁴ *Ibid* pages 285-286.

¹⁸⁵ SALC n 14 pages 177-178.

the perpetrator of such offence is a national of or permanently resident in the Republic, was arrested in the territory of the Republic or is a company incorporated in terms of South African law.¹⁸⁶

The implementation of this provision will mark a significant breakthrough in the protection of children against sexual exploitation in South African law. However, the experience and expertise in dealing with extraterritorial jurisdiction is limited. It can be said that the international community is still in the learning phase as far as the understanding and application of extraterritorial jurisdiction in child sex tourism cases is concerned. The true worth of this provision will lie in the ability of the government to develop a cost effective, sustainable system for prosecuting offenders.¹⁸⁷

5. CONCLUSION

South Africa's legal measures to combat sexual exploitation of children are in many respects commendable. The positive aspects of the Sexual Offences Act and common law offences can be summed up as follows: prostituting a child is a punishable offence; having sex with a minor is a serious crime regardless of consent; taking children from their parents for purposes of sexual exploitation is an offence; keeping a brothel, procuring a child and making a living off the earnings of child prostitution are illegal acts; having sex with a female child against her will amounts to rape and transporting and keeping people against their will constitutes kidnapping.¹⁸⁸

However, despite these strengths, there are still too many loopholes. There is inconsistency in legislation relating to child prostitution.¹⁸⁹ The legislative provisions protecting children from commercial sexual exploitation are fragmented. There is currently one statute and various common law offences, each dealing with different aspects of child sex tourism as opposed to a single comprehensive statute to refer to in handling these cases.¹⁹⁰

¹⁸⁶ Section 56(1).

¹⁸⁷ Dionne *Legal and Judicial aspects: Extraterritorial law and Extradition* 3, a presentation made by the Director –General of the International Bureau for Children's Rights.

¹⁸⁸ IOM "The Risks of Specialised Human Trafficking Legislation" August 2004 *Eye on Human Trafficking* 4.

¹⁸⁹ Hesselink-Louw *et al* n 45 page 368.

¹⁹⁰ IOM n 188 page 4.

There are situations that are not adequately provided for and others that are not provided for at all. The Sexual Offences Act and common law do not specifically deal with the issues of child sex tourism or child trafficking. As a result there are no specialised measures to firstly facilitate the investigation and prosecution of these offences and secondly to assist the victims of such offences.¹⁹¹ Another criticism is that, for the most part, children are dealt with under the same provisions that apply to adults instead of being afforded special protection by the law.

The legislative provisions contained in the Sexual Offences Bill will go a long way to improving the present system for victims of sexual offences.¹⁹² The Sexual Offences Bill affords significant improvements to the definition and management of sexual offences against children in South Africa. It deals with sexual offences against children separately from offences against adults, thereby affording children special protection. The Bill contains specific provisions on child sex tourism and extraterritorial application of laws couched in gender-neutral terms thereby affording protection for all child sex tourism victims.

¹⁹¹ SALC *Sexual Offences: Adult Prostitution* Project 107 (31 October 2002) 84.

¹⁹² SALC n 43 page 7.

CHAPTER 4

CHILD PROTECTION LAWS PERTAINING TO CHILD SEX TOURISM

1. INTRODUCTION

South Africa is obligated through customary international law and the various treaties which it has ratified at both world level and regional level to protect children from child sex tourism. It is therefore necessary to delve into how these obligations have translated into child protection legislation on a national level.

This chapter focuses on child sex tourism from a child protection perspective. It covers South Africa's Constitutional provisions on the protection of children as well the provisions of the Child Care Act¹ and Domestic Violence Act.² It also deals with the provisions of the new Children's Act,³ which has been assented to by the President but not yet promulgated, and the provisions of which improve on other existing child protection legislation in relation to child sex tourism.

2. THE CHILDREN'S CHARTER OF SOUTH AFRICA⁴

On 1 June 1992, the "International Summit on the Rights of the Children in South Africa" adopted the Children's Charter of South Africa. The summit formed part of the "International Conference on the Rights of Children in South Africa" held on 10 June 1992. The summit brought together more than 200 of South Africa's children aged between 12 and 16 years to discuss the continued violation of children's rights in this country. The Charter is unique in

¹ Act 74 of 1983.

² Act 116 of 1998.

³ Act 38 of 2005.

⁴ The Children's Charter of South Africa, adopted on 1 June 1992.

that it was drawn up and adopted by the children themselves. The Charter therefore represents their opinions and pleas related to the issues affecting children in this country.⁵

The Charter gives recognition to the fact that all children are created equal and are entitled to human rights and freedoms. It recognises also that children within South Africa have not been treated with the dignity and respect they deserve and should be afforded special care and protection.⁶

Most importantly, the Charter sets out over 50 rights⁷ to which all children are entitled, some of which affect victims of child sex tourism either directly or indirectly, including:

- i) the right to be protected from all types of violence including: physical, emotional, sexual, state, political, gang, domestic, school, township and community, street, racial, self-destructive and all other forms of violence;⁸
- ii) the right to be protected from child labour and any other economic exploitation which endangers a child's mental, physical, or psychological health and interferes with his/her education so that he/she may develop properly and enjoy childhood;⁹ and
- iii) the right to be protected from prostitution and sexual exploitation such as pornography.¹⁰

The resolutions contained in the Charter include the demand that the government adopt and support the Children's Charter and that children's representative or council of representatives be given the right to participate in and be consulted about government issues in the future. Other legal instruments pertaining to the protection of children are expressed in the language and thought process of adults but the Children's Charter has opened a pathway for children to be given "a voice" with regard to their rights.¹¹

⁵ Molo Songololo *About the Children's Charter* 1992.

⁶ Preamble.

⁷ See King "Against children's rights" 1996 *Acta Juridica* 28 and "South African children speak out" 1993 *International Journal of Children's Rights* 71.

⁸ Article 5(1).

⁹ Article 9(1).

¹⁰ Article 9(3).

¹¹ Lloyd "A theoretical analysis of the reality of children's rights in Africa: An introduction to the Africa Charter on the Rights and Welfare of the Child" 2002 *African Human Rights Law Journal* 15.

Significantly, the adoption of the Children's Charter has given meaning to Article 12 of the Convention of the Rights of the Child in terms of which State Parties assured that the child who is capable of forming his or own views, would be given the opportunity to express those views in all matters affecting the child.

Children, by way of this Charter, demanded that they be placed first on the priority list of politicians. The Charter also recognised that the new Constitution and Bill of Rights, which were pending at the time, would have considerable implications for the realisation of the rights contained in the Charter.¹² In fact the rights contained in the Charter were taken into account when the Constitution was drafted.¹³

3. THE CONSTITUTION

Following on from the Children's Charter, the South African Constitution¹⁴ affords children with special protection in section 28 of the Bill of Rights. According to this section, all children are entitled to protection from "maltreatment, neglect, abuse or degradation"¹⁵ and from being required to perform work or provide services that are inappropriate for their age or place their health or well-being at risk.¹⁶ The Constitution by way of section 28 prohibits child sex tourism and child prostitution.

The inclusion of children's rights in the Bill of Rights is "derived from the Convention" of the Rights of the Child.¹⁷ The Constitutional Court, in the case of *Grootboom* made reference to the Convention as follows:

"The extent of the state obligation must be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms

¹² Mabandla "Survey of Child Protection Legislation in South Africa" in CDS (eds) *International Conference on the Rights of the Child: Papers and Reports of a Conference Convened by the Community Law Centre Cape Town, June 1992* (1992) 134.

¹³ Lloyd n 11 page 15.

¹⁴ The Constitution of the Republic of South Africa Act 108 of 1996.

¹⁵ S 28(1)(d).

¹⁶ S 28(1)(f).

¹⁷ Sloth-Nielsen "Ratification of the UN Convention on the Rights of the Child: Some implications for South African Law" 1995 (11) *SAJHR* 401; Cheadle *et al South African Constitutional Law: The Bill of Rights* (2002) 508.

to meet these obligations. It requires the state to take steps to ensure that children's rights are observed."¹⁸

The rights of children to protection from sex tourism are further entrenched in section 28(2) which states that the "best interests of the child" is the paramount consideration in every matter concerning the child.¹⁹ Since the Constitution does not define the term "best interests", the scope for interpretation is wide. It has been suggested that "the inclusion of a general standard for the protection of children's rights can become a benchmark in the review of all proceedings in which decisions are taken regarding children".²⁰ This section of the constitution affords victims of child sex tourism the right not to be further victimized by the justice system and the right of access to places of safety and care during the process of recovery.²¹

Even though section 28 does not specifically refer to violence, this does not mean that children are not constitutionally protected against violence.²² They are in terms of section 12 of the Constitution, entitled to freedom and security of the person which includes the right to be "free of all forms of violence from either public or private sources".²³

It is submitted that all forms of modern-day slavery of children violate their fundamental rights and undermine the rights of a child to be nurtured in a protective family environment, free from sexual abuse and exploitation.²⁴ Section 13 of the Constitution is also significant in that it prohibits slavery, servitude and forced labour. Child prostitution can be construed as a form of forced labour.²⁵ Examples of servitude include debt bondage, any practice where a

¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 75.

¹⁹ Hesselink-Louw, Bezuidenhout & Boniface "South African Law and Child Prostitution: an Overview" 2004 *Stell LR* 352 361.

²⁰ Sloth-Nielsen "Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa" in Keightly (ed) *Children's Rights* (1996) 26.

²¹ Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation-South Africa* (2000) 73.

²² Webster *The Protection of Children from Violence* (July 2001), Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England, September 2001.

²³ S 12(1)(c).

²⁴ Shahinian (Director of Centre for Gender Studies 'Democracy Today') *Trafficking in Women and Girls* (8 November 2002), compiled for Expert Group Meeting on trafficking from 18-22 November in New York, USA; Fitzgibbon "Modern-day slavery? The scope of trafficking in persons in Africa" 2003 *African Security Review* 81 86.

²⁵ Taken from Fraser-Moleketi "Children involved in Prostitution", Speech at HSRC (10 March 1995).

person is sold into marriage and the delivery of a child by a parent or guardian to another for purposes of sexual exploitation.²⁶

Vitally important is section 10 of the Constitution, which recognises the “inherent dignity” of every person and affords everyone (including children) the right to have “their dignity respected and protected”. This right has a central place in the Constitution.

In *S v Makwanyane*,²⁷ O’Regan J stated:

*“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [Bill of Rights].”*²⁸

The principle of Constitutional supremacy dictates that the rules of the constitution are binding on all branches of the government and have priority over any other rules made by the government.²⁹ Therefore any law or conduct that is not in accordance with the Constitution is invalid.³⁰ The Constitution thus provides a firm framework within which South Africa can fulfil its international obligations to protect children from child sex tourism.

4. THE CHILD CARE ACT

Many of the child protection provisions of the Constitution are embodied in the Child Care Act, which is aimed at the general protection and welfare of children in South African law.

The most significant provision with respect to child sex tourism is Section 50A of the Act which provides for the prosecution of any person directly involved in the commercial sexual exploitation of children.³¹ Swiss child sex tourist, Zimmerman was initially arrested on suspicion of having contravened section 50 A. This section does not however, explicitly cover the conduct of any person who enables or facilitates the sexual exploitation of children. In

²⁶ Cheadle *et al* n 17 pages 178-179.

²⁷ 1995 (3) SA 391 (CC).

²⁸ par 144.

²⁹ S 8; Currie & de Waal *The Bill of Rights Handbook* (2005) 8-9.

³⁰ S 2.

³¹ “Commercial sexual exploitation” is defined in s 1 as the “the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parent or guardians of the child, the procurer, or any other person”.

other words this section covers the actual act of sexual exploitation by a child sex tourist and the place where it occurs but not activities related to the exploitation like trafficking, for example.³²

In support of this, section 50A also makes it an offence for an owner, lessor or manager of property where the exploitation occurs to fail to report the occurrence within a reasonable time of becoming aware of it.³³ The term “property” is not defined by the Act and it is uncertain whether it is confined to a building or if it would include a car in which sexual exploitation occurs.³⁴

Section 50A has been inserted into the Child Care Act by means of the Child Care Amendment Act 13 of 1999, in response to the First World Congress against the Commercial Sexual Exploitation of Children of 1996.³⁵ The addition of this section to the Child Care Act has definitely strengthened South Africa’s current child protection legislation.

Also important are the provisions related to abduction and trafficking. These issues are covered by section 51, which deals with the unlawful removal of children. It terms of this section, any person who abducts or removes any child or induces or aids any child to abscond or knowingly harbours or conceals a child who has been abducted or prevents the return of such child is guilty of an offence.

Another key provision in the Act sets out the description of a “child in need of care”³⁶ which includes a child who: has been abandoned;³⁷ lives in situations likely to cause his or her abduction or sexual exploitation;³⁸ is exposed to circumstances which may harm his or her well-being³⁹ or has been sexually abused or ill-treated by his or her parents.⁴⁰ This section covers a vast number of children who are particularly vulnerable to child sex tourism.

Furthermore, the conduct of the parents and guardians are dealt with in section 50(1) which states that:

³² Molo Songololo n 21 page 75.

³³ 50A (1).

³⁴ Hesselink-Louw *et al* n 19 page 363.

³⁵ See *Sexual Offences: Adult Prostitution* Project 107 (31 October 2002) 5.

³⁶ S 1 of the Child Care Act defines a “child in need of care” as a child referred to in s 14(4) of the Act.

³⁷ S 14(4)(aB)(i).

³⁸ S 14(4)(aB)(iii).

³⁹ S 14(4)(aB)(iv).

⁴⁰ S 14(4)(aB)(vi).

- “Any parent or guardian of a child or any person having the custody of a child who-*
- (a) ill-treats that child or allows it to be ill-treated; or*
 - (b) abandons that child, or any other person who ill-treats a child, shall be guilty of an offence.”*

This means that a person other than a parent or guardian only commits an offence by directly ill-treating a child and not for merely allowing the ill treatment to occur. As long as the person accused of facilitating the ill-treatment of a child can show that he or she did not directly ill-treat a child, he or she would not be guilty of an offence. For example, a taxi driver who transports a child to a place where he or she is sexually exploited, can show that he or she did not directly ill-treat the child and thereby avoid prosecution even though he or she facilitated the ill-treatment. The Act does not define “ill treatment” and this, according to Koen, leaves room for personal interpretation which could hinder the prosecution of offenders.⁴¹

On the issue of child labour, the Child Care Act provides that, any person who employs or provides work to any child under the age of 15 years is guilty of an offence.⁴² This provision will impact on facilitators of child sex such as bar owners and brothel-keepers who “employ” children to provide sexual services. This strengthens the protective measures provided for in the Basic Conditions of Employment Act.⁴³

The Children’s Act repeals the Child Care Act in its entirety.⁴⁴ However, until such time as regulations⁴⁵ are made for the enforcement of the Children’s Act, which will allocate roles and responsibilities in an “integrated, coordinated and uniform manner,”⁴⁶ the provisions of the Child Care Act will still be applicable.

The provisions of the Child Care Act can be utilised to protect children from various role players of child sex tourism. However, there are several inadequacies which need to be

⁴¹ Koen *et al* *The Trafficking of Children for Purposes of Sexual Exploitation* (2000) 84.

⁴² S 52A(1).

⁴³ Act 75 of 1997 to be discussed in chapter 5, par 4.

⁴⁴ N 3.

⁴⁵ Sometimes legislation may require certain actions to be taken by the Department before it can be implemented, for instance regulations may have to be prepared and promulgated to further regulate aspects in terms of the legislation. In such instances the Act comes into operation on a date determined by the President by proclamation in the *Gazette*. See Department of Justice and Constitutional Development “The Legislative Process” at www.doj.gov.za/2004dojsite/legislation/legprocess.htm (Date accessed: 14/06/06).

⁴⁶ S 4(1) of Bill 70D of 2003.

addressed. Some of these inadequacies will be highlighted in the discussion on the Children's Act in paragraph 6.

5. DOMESTIC VIOLENCE ACT

Closely linked to the Child Care Act but less effective in child sex tourism cases, is the Domestic Violence Act 116 of 1998. It does not apply to the conduct of the child sex tourist but rather to those persons in a domestic relationship with the child who abuse or facilitate the abuse of the child.

The Act provides protection for children from all forms of sexual abuse. Sexual abuse is defined by the Act as “any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the complainant”.⁴⁷ The effect of the Act is that its legislative measures can be utilized for the protection of children from all forms of ill-treatment including forcing children into prostitution⁴⁸ or trafficking children for the purpose of sexual exploitation.⁴⁹ Moreover, the provisions of the Act can be employed to protect children from being forced to perform a sexual act against their will⁵⁰ or being coerced by a parent into submitting to sexual exploitation.⁵¹

Two different forms of trafficking of children for purposes of sexual exploitation are covered by this Act.⁵² Firstly, there is the case of parents or relatives who coerce a child to “work” from home or the homes of sex exploiters. Secondly, it covers the case, where a child is sold or given away as a sex slave or “child bride”⁵³ and forced to perform sexual and/or domestic labour.⁵⁴

⁴⁷ S 1. The scope of this Act is substantially broader than its predecessor, the Prevention of Family Violence Act of 1993. See Department of Justice Constitutional Development *Report to the Joint Monitoring Committee on the Improvement of Quality of Life and Status: Resources for Implementing Acts and Programmes* (4 April 2003) 8.

⁴⁸ Hesselink-Louw *et al* n 19 page 363.

⁴⁹ Molo Songololo n 21 page 81.

⁵⁰ Stilwell *Battered Women: Legal Remedies of Domestic Violence* (2001) 3.

⁵¹ Molo Songololo n 21 page 81.

⁵² *Ibid.*

⁵³ Koen *et al* n 41 page 93.

⁵⁴ Molo Songololo n 21 page 81.

The Act can be applied to protect the child from continued abuse and violence through the issuing of protection orders⁵⁵ and to prosecute the offender.⁵⁶ An application for a protection order may be brought on behalf of a minor complainant by any other person, including a counselor, member of the SAPS, social worker or teacher.⁵⁷

Essentially, the Domestic Violence Act supplements the protection afforded to children by the Child Care Act.

6. CHILDREN'S ACT⁵⁸

6.1 BACKGROUND

In 1997, the SALC was given the task of investigating and reviewing the Child Care Act 74 of 1983 and to make recommendations to the Minister for Social Development for reform in this area of the law. A project committee was appointed to carry out the investigation. The SALC saw its mandate as going beyond the confines of the Child Care Act and included in its investigation all statutory, common, customary and religious law affecting children. The SALC envisaged the formulation of a single comprehensive children's statute for the protection of children in South Africa.⁵⁹

Various research papers were prepared on numerous aspects of child care.⁶⁰ A discussion paper containing the SALC's preliminary recommendations and findings was released for comment in December 2001. The Commission then consulted with various individuals, organisations, and institutions who were invited to make submissions on the preliminary recommendations contained in the discussion paper.⁶¹

The Report on the Review of the Child Care Act of 2002 is the product of an extensive consultative process. It contains the SALC's final findings and recommendations and the draft

⁵⁵ S 7.

⁵⁶ S 17.

⁵⁷ S 4(3). This provision is discussed in Webster n 22.

⁵⁸ N 3.

⁵⁹ SALC *Report on the Review of the Child Care Act* Project 110 (December 2002) 1 (Available on Internet at www.law.wits.ac.za/salc/salc.html) (Date accessed: 15/05/03).

⁶⁰ *Ibid.*

⁶¹ *Ibid* page 2.

Children's Bill.⁶² The Children's Bill was referred to the Chief State Law Advisor in August 2003 and certified in October 2003 as Bill 70 of 2003.⁶³

The Bill was initially submitted to Parliament as a consolidated Bill, dealing with the full spectrum of child protection issues in both national and provincial spheres. It was initially intended to be dealt with in terms of section 76 of the Constitution which covers matters of concurrent national and provincial legislative competence. It was later found to contain elements to be handled in terms of both section 75, which applies to matters of exclusive national legislative competence, and section 76 of the Constitution. As a result, the Deputy Speaker of the National Assembly requested that the consolidated Bill be split into two, a principal Bill on matters which apply to national government only and an amendment Bill on matters which apply to the provincial government only.⁶⁴

The principal Bill,⁶⁵ being dealt with in terms of section 75, was referred to the Parliamentary Portfolio Committee on Social Development in November 2003 and was finally passed by Parliament⁶⁶ in December 2005. The Children's Act 38 of 2005⁶⁷, as it is now known, has since been assented to by the President but not yet promulgated. The Act will only come into operation on a date to be determined by proclamation in the Government Gazette, as the amendment Bill is yet to be passed by Parliament and regulations still have to be developed before the Act can be enforced.⁶⁸ The Amendment Bill has been tabled as Bill 19 of 2006. The Select Committee (the parliamentary committee of the National Council of Provinces) are indicated to be deliberating on the Bill in October 2006.⁶⁹ Once the amendment Bill is passed by Parliament, it will be merged with the Children's Act.⁷⁰ The Children's Act then will consolidate the laws relating to the welfare and protection of

⁶² *Ibid.*

⁶³ Schedule 4, Memorandum on the Objects of the Children's Bill, contained in Act 38 of 2005.

⁶⁴ *Ibid.*

⁶⁵ The final version of which is Bill 70 D of 2003.

⁶⁶ Parliament consists of two houses, the National Assembly and the National Council of Provinces. The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. The National Council of Provisions represents the provinces to ensure provincial interests are taken into account in the national sphere of government. Both these houses participate in the legislative process. See s 42 of the Constitution.

⁶⁷ The Act was published in Government Gazette No. 28944 on 19 June 2006.

⁶⁸ Ronel Van Zyl, Researcher: South African Law Commission.

⁶⁹ *Ibid.*

⁷⁰ IOM "South Africa Criminalises Child Trafficking" July 2005 *Eye on Human Trafficking* 1.

children, define the rights and responsibilities of children and set out the principles and guidelines for the protection of children in general.⁷¹

It is necessary to expand on specific provisions affecting victims of child sex tourism.

6.2 GUIDING PRINCIPLES

The SALC noted that one of the major shortcomings of the Child Care Act is the fact that it does not contain a list of principles to guide decision-makers in the implementation of its provisions.⁷² Owing to the recent increase in reported cases of child exploitation and neglect, the inclusion of clearly formulated principles in future child protection legislation will encourage decision-makers to focus on allocating limited social resources and services to the most vulnerable groups of children.⁷³

Accordingly, the SALC recommended that an “objects and general principles clause” be included in the new Children’s Act.⁷⁴

Chapter 1 of the Children’s Act outlines the objects of the Act which include: to give effect to the South Africa’s international obligations concerning the well-being of children; to give effect to certain children’s rights as contained in the Constitution, such as the right to protection from maltreatment, neglect, abuse or degradation and to promote the protection and well-being of children in general.⁷⁵

In addition to these objects, the Act contains a set of general principles to guide decision-makers in the implementation of the provisions contained in the Act.⁷⁶ The guiding principles having direct impact on victims of child sex tourism include the following:

- i) if a child is of the age or maturity level at which he or she is capable of participating in a matter concerning him or expressing views on matters pertaining to him, he or she must be given the opportunity to do so;⁷⁷

⁷¹ See Preamble of Children’s Bill.

⁷² SALC n 59 page 2.

⁷³ *Ibid* pages 14 -15.

⁷⁴ *Ibid*.

⁷⁵ S 2.

⁷⁶ Chapter 2.

- ii) the best interests of the child are paramount in matters pertaining to child⁷⁸ and
- iii) a child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.⁷⁹

Essentially, these principles are derived from international law such as the African Charter on the Rights and Welfare of the Child, from policy documents, common law, case law and accepted social work practice.⁸⁰

6.3 SEXUAL ABUSE

One of the Commission's main criticisms of child care legislation in South African law is that there are no definitions for "child abuse", "child sexual abuse" or even "child neglect".⁸¹ The Commission recommended that provision be made for such definitions in the Act.

Impressively, section 1 of the Children's Act provides definitions for both "abuse" in relation to a child and "sexual abuse" in relation to a child. "Abuse" of a child, means "any form of harm or ill-treatment deliberately inflicted on a child" including:

- i) assaulting a child or inflicting deliberate injury to a child;
- ii) sexually abusing a child or allowing the sexual abuse of a child;
- iii) exploitative labour practices involving a child or
- iv) subjecting a child to behaviour that may be psychologically or emotionally harmful to the child.

"Sexual abuse" of a child means:

⁷⁷ S 10.

⁷⁸ S 9.

⁷⁹ S 12.

⁸⁰ SALC n 59 page 13.

⁸¹ SALC *Report on Sexual Offences against Children* Issue Paper 10, Project 108 (May 1997) 17.

- i) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;
- ii) encouraging, inducing or forcing a child to be used to sexually gratify another;
- iii) using a child in or exposing a child to pornography or
- iv) procuring a child or allowing a child to be procured for the purposes of commercial sexual exploitation or participating in or assisting in the commercial sexual exploitation of a child in any way.

Moreover, the Act expands on the definition of commercial sexual exploitation contained in the Child Care Act by incorporating trafficking of a child for use in sexual activities, child prostitution and child pornography into the definition.⁸² These are noteworthy developments as far as child sex tourism is concerned because the conduct of the various role-players of child sex tourism, are encompassed in the definition of sexual abuse.

6.4 A CHILD IN NEED OF CARE

Significantly, the SALC emphasised the point that the child prostitute is not a criminal and should be treated as a “child in need of care” and protection. It was also submitted in this regard that section 14(4) of the Child Care Act⁸³ is working well and that its principles should be retained in the Children’s Act. However, it was pointed out that this section allows a number of children to fall through the cracks because it does not cover situations where the parent of a child is physically or mentally ill, unemployed, not gainfully employed or is serving a prison sentence while the child is being supported by those who do not have a legal obligation to support the child and who need assistance to do so.⁸⁴

⁸² In terms of s 1 of the Children’s Act:

“commercial sexual exploitation”, in relation to a child, means –

“(a) the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person; or

(b) the trafficking of a child for use in sexual activities, including prostitution or pornography”.

⁸³ As discussed in par 3.3 above.

⁸⁴ SALC n 59 pages 44-45.

In pursuance of this approach, the SALC recommended that the criteria to determine if a child is a “child in need of care”, as listed in the Child Care Act should be retained but expanded on in the Children’s Act.⁸⁵

Chapter 9 of the Act focuses on children in need of care and protection. The definition of a “child in need of care” contained in the Child Care Act is expanded on in the Act by including a child who lives or works on the street or begs for a living; a child who is orphaned and is without any visible means of support; a child who may be at risk if returned to the parent, guardian or care-giver of the child because there is reason to believe that he or she will be exposed to circumstances which may cause serious harm to his or her physical, mental or social well-being.⁸⁶ Many victims of child sex tourism live in circumstances such as these and will be given special protection.

In addition to this, the Act stipulates that a victim of child labour or a child living in a child-headed household, may be a “child in need of care and protection” and must be referred to a designated social worker for investigation.⁸⁷ Even if after investigation, a social worker finds that such a child is not a “child in need of care and protection” as contemplated in subsection, the social worker must where necessary take measures to assist that child, including providing counselling or early intervention services and referring the child to other suitably qualified persons or organisations.⁸⁸ These are preventative measures to ensure that the circumstances of children who are not “in need of care and protection” do not deteriorate any further. This will curb the number of children who are vulnerable to child sex tourism.

6.5 TRAFFICKING

Equally important, are the provisions in the Act related to trafficking. The SALC pointed out that the issue of trafficking in persons and children in particular is receiving renewed international attention and that South Africa has not yet enacted specific anti-trafficking legislation.⁸⁹ The SALC therefore recommended the inclusion of a general provision criminalising the trafficking of children in the Children’s Act. It pressed for the suspension of

⁸⁵ *Ibid* page 46.

⁸⁶ S 150(1).

⁸⁷ S 150(2).

⁸⁸ S 150(3).

⁸⁹ SALC n 59 page 295.

all parental rights should a court find that a child has been trafficked for purposes of commercial sexual exploitation by his or her parents.

Furthermore, the SALC stated that the provisions of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children of 2000⁹⁰ should be incorporated into the Children's Act and that bilateral or multilateral agreements should be concluded with the major countries that are not parties to the Protocol and from which children are being trafficked to South Africa or to which South African children are being trafficked.⁹¹

Chapter 18 of the Act is dedicated to the issue of trafficking of children. The purpose of this Chapter is to give effect to the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children⁹² and to regulate trafficking in children in general.⁹³ Subject to the provisions of the Bill, the Protocol acquires the force law in the Republic.⁹⁴

The pinnacle aspect with regard to child sex tourism is that the Act makes it an offence for any person to traffic a child or allow a child to be trafficked.⁹⁵ This is in addition to any other offence for which a person may be convicted, meaning that if a person convicted for trafficking in children has also raped the victim, he or she can also be convicted of the crime of rape. The prohibition on child trafficking also applies to juristic persons and partnerships, which means that syndicates can be prosecuted under the Act.⁹⁶

Also crucial, is the prohibition of the facilitation of child trafficking. It is an offence for any person to knowingly lease, sublease or allow any room, house or building to be used for the purpose of harbouring a child.⁹⁷ It is also an offence to "advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means".⁹⁸ This also applies to the use of the Internet to facilitate child trafficking. All Internet service providers are obligated to

⁹⁰ UN Doc A/55/383 (2000) Annex 1.

⁹¹ SALC n 59 pages 295-296.

⁹² S 281(a).

⁹³ S 281(b).

⁹⁴ S 282.

⁹⁵ S 284(1).

⁹⁶ IOM n 70 page 1.

⁹⁷ S 285(1)(a).

⁹⁸ S 285(1)(b).

report the existence of a site on its server containing this type of information to the SAPS.⁹⁹ This expands on the provisions of section 27A of the Films and Publications Act.¹⁰⁰

Laudably, the Act makes provision for the extraterritorial application of its trafficking provisions¹⁰¹ which enables the government to prosecute South African citizens and permanent residents who commit offences of child trafficking in other countries, thereby providing protection for all children regardless of where they live.

The Act also recognises the vulnerability of foreign child victims of trafficking, by stipulating that, before returning a child who is a victim of trafficking to his or her home country, the Director-General must consider the safety of the child, the availability of care arrangements in the country to which the child is being returned and also the possibility that the child may be trafficked again, harmed or killed in that country.¹⁰²

In addition, the Act places a legal obligation on immigration officials, police officials and social workers, amongst others, to refer child victims of trafficking to a designated social worker for an investigation to determine if these children are in need of care and protection,¹⁰³ and should they be found to be, the protective measures in terms of the legislation will be applicable to them.¹⁰⁴

In support of this, the Act states that any child victim of trafficking found in South Africa must be referred to a designated social worker for investigation.¹⁰⁵ The child may, pending such investigation, be placed in temporary safe care.¹⁰⁶ If it is an illegal foreign child that is investigated and brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act 130 of 1998.¹⁰⁷ If such illegal foreign child is found to be a "child in need of care and protection", he or she may remain in South Africa for the duration of the court order.¹⁰⁸ As the current Immigration Act¹⁰⁹ is more

⁹⁹ S 285(2).

¹⁰⁰ Act 65 of 1996 to be discussed in chapter 5, par 5.

¹⁰¹ S 291.

¹⁰² S 290.

¹⁰³ S 288.

¹⁰⁴ IOM n 70 page 1.

¹⁰⁵ S 289(1)(a) .

¹⁰⁶ S 289(1)(b).

¹⁰⁷ S 289(2).

¹⁰⁸ S 289(3).

¹⁰⁹ Act 13 of 2002.

concerned with ridding the country of unwanted people of all ages rather than the rights of children, these provisions in the Act ensure that illegal foreign children do not endure further victimisation in terms of immigration laws.

Moreover, the Director-General¹¹⁰ must facilitate and accept the return of a South African child who is a victim of trafficking, as quickly as possible with due regard for the safety of the child.¹¹¹ This includes issuing the travel documents and authorisations necessary to enable such a child to travel to and enter South Africa.¹¹² This provision applies to a child who had permanent residency in South Africa at the time of entry into the territory of the country to which he or she had been trafficked.¹¹³ The Act provides that, if a court finds that the parent or care-giver of a child has trafficked the child, the court may suspend all parental rights of that parent or care-giver pending an inquiry by a children's court.¹¹⁴

In an interview with the International Organisation of Migration, Advocate Lowesa Stuurman of the SALC, who drafted Chapter 18, stated that the Children's Act deals with trafficking in children only and that the matter of trafficking in adults will be addressed in comprehensive legislation on trafficking in persons, yet to come. The provisions relating to trafficking in children found in child care legislation will be incorporated into the legislation on trafficking in persons as soon as it is finalised.¹¹⁵

The provisions of Chapter 18 comprehensively cover the conduct of many of the role-players in child sex tourism. Until such time as specific trafficking legislation is enacted, the Children's Act will protect child sex tourism victims from being trafficked.

6.6 NATIONAL CHILD PROTECTION REGISTER

Another key provision dealing with the protection of children is Chapter 7 of the Act, which provides for the keeping of a National Child Protection Register.

¹¹⁰ In terms of s 1 of the Children's Act "Director-General" means the "Director-General of the national department responsible for the provision of social development services or where the context indicates the Director-General of another department, that Director-General".

¹¹¹ S 286(1)(a).

¹¹² S 286(1)(b)(ii).

¹¹³ S 286(1)(a).

¹¹⁴ S 287(a).

¹¹⁵ IOM n 70 page 8.

The Act stipulates that the Director-General must keep and maintain a National Child Protection Register. This register is divided into two parts: Part A and Part B.¹¹⁶ The purpose of Part A is to have a record of all reports and convictions of abuse or deliberate neglect inflicted on specific children and all findings by a children's court that a child is in need of care and protection.¹¹⁷ This information is then used to protect these children from further abuse or deliberate neglect.¹¹⁸

The purpose of Part B, on the other hand, is to provide a record of persons who are unsuitable to work with children and to use this information to protect children in general from these persons.¹¹⁹ A person whose name appears in Part B will not be permitted to manage, operate, work at or have access to children (in any capacity) at child welfare institutions, including child and youth care centres, partial care facilities, shelters or schools.¹²⁰ Designated child protection organisations may not permit a person whose name appears in Part B of the Register to work with or have access to children on its behalf.¹²¹

The establishment of a register will ensure that even once sex offenders pay their penalties or serve their prison time, the government is still able to keep track of them and restrict their opportunities of continuing to abuse children. This is significant in that convicted sex offenders, including child sex tourists, will not be able to gain access to potential victims by applying for positions which involve working with children.

6.7 ENFORCEMENT OF THE ACT

In support of the provisions relating to persons who are unsuitable to work with children, the Act also provides for the inspection of child and youth care centres, partial care facilities, shelters and drop-in centres by certain authorised persons who are permitted to interview any child found at such a place or cause a child to be examined or assessed by a medical officer, social worker or psychologist.¹²²

¹¹⁶ S 111.

¹¹⁷ S 113(a).

¹¹⁸ S 113(c).

¹¹⁹ S 118.

¹²⁰ S 123(1).

¹²¹ S 123(2).

¹²² S 304(1).

Furthermore, the Act provides that the owner, lessor, manager, tenant or occupier of a premises on which a child has been subjected to commercial sexual exploitation, who upon becoming aware of it, fails to promptly take reasonable steps to report it to the SAPS, commits an offence.¹²³ This Act improves on section 50A of the Child Care Act by insisting that the reporting take place “promptly” and not just within a “reasonable time”.

Also, the Act expands on section 50(1) of the Child Care Act by stating that not only a parent, guardian or person who has the parental responsibility for a child but also a care-giver or person with no parental responsibility in respect of a child, who voluntarily cares for the child indefinitely or temporarily, who abuses, deliberately neglects the child or abandons the child commits an offence.¹²⁴

Additionally, it is an offence for a person who is “unfit to work with children” to: operate or in any way assist at a youth centre, partial care centre or shelter or to foster or even apply for the fostering or temporary safe care of a child.¹²⁵ Convicted child sex tourists would fall into this category.

In effect, a person convicted of any of the above offences is liable to a fine or to imprisonment for a period not exceeding ten years or both.¹²⁶ Should such a person be convicted of any of these offences more than once, he or she may be liable upon conviction to a fine or imprisonment for a period not exceeding 20 years or both.¹²⁷ A definite improvement created by the Act is that the penalties provided for are far more harsh than those contained in the Child Care Act.

On the whole, these provisions are praiseworthy and will go a long way in protecting children from child sex tourism.

¹²³ S 305(5).

¹²⁴ S 305(3).

¹²⁵ S 305(2).

¹²⁶ S 305(6).

¹²⁷ S 305(7).

7. CONCLUSION

The South African government and the courts are under international and constitutional obligations to protect children in particular from violent crime.¹²⁸ The currently enforceable legal measures employed with respect to child protection in South Africa, namely, section 28 of the Constitution, the Domestic Violence Act, and the Child Care Act are indeed praiseworthy. The positive aspects as far as child sex tourism is concerned are that: the direct involvement in the commercial exploitation of children is prohibited; the conduct of parents who ill-treat or allow their child to be ill-treated is covered; the abduction or removal of a child is an offence; and the failure of an owner, lessor or manager of property where the exploitation occurs, to report the occurrence within a reasonable time of becoming aware of it is an offence.

However, there are still far too many loopholes. The Child Care Act does not explicitly cover the conduct of any person who enables or facilitates the sexual exploitation of children; activities such as child trafficking are not specifically addressed; it is not an offence for a person who is not the parent or guardian to allow or facilitate the ill-treatment of a child; there are no definitions provided for the “ill-treatment” or “sexual abuse” of children and the definition of a “child in need of care and protection” allows many victims or potential victims of child sex tourism to fall through the cracks.

The SALC is convinced that the legislative provisions contained in the Children’s Act, which address these loopholes, will go a long way to improving the present system of child protection¹²⁹ once it is enforced.

The Children’s Act as a whole is a landmark for the protection of children’s rights in South Africa.¹³⁰ Once the amendment Bill is merged with the Children’s Act, the Act will form a comprehensive piece of legislation that holistically addresses the needs of children both in respect of prevention of abuse and their care and protection.¹³¹ This will assist in protecting

¹²⁸ *S v Abrahams* 2002 (1) SACR 116 (SCA), with reference to *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC); *Carmichele V Minister of safety and Security* 2001 (4) SA 938 (CC).

¹²⁹ SALC n 59 page 7.

¹³⁰ IOM n 70 page 8.

¹³¹ Childline SA “Policy Making” at http://www.childlinsa.org.za/sexual_offences.htm (Date accessed: 2/02/06).

children from child sex tourism, by ensuring that fewer children are vulnerable to it and those who are already victims of it receive the necessary care.

CHAPTER 5

OTHER ISSUES RELATED TO CHILD SEX TOURISM

1. INTRODUCTION

Apart from sexual offences and child protection, there are other issues related to child sex tourism that need to be addressed as well, namely child sex tourism as: an organised crime; an immigration issue; a form of child labour and an Internet crime related to child pornography.

The pieces of legislation which apply respectively in these cases are the Prevention of Organised Crime Act;¹ the Immigration Act;² the Basic Conditions of Employment Act;³ the Films and Publications Act⁴ and the Electronic Communications and Transactions Act.⁵ The purpose of this chapter is to outline the applicability and effectiveness of each of these Acts to the issue of child sex tourism.

2. PREVENTION OF ORGANISED CRIME ACT ⁶

Commercial sexual exploitation of children is a persistent problem in South Africa and has become more organised in recent years.⁷ Organised criminal networks thrive on trading in persons for the purposes of sexual exploitation.⁸ Reports indicate that trafficking of foreign girls into South Africa for commercial exploitation is controlled by organised criminal gangs and that trafficking networks dominated by Nigerian organised crime have expanded into

¹ Act 121 of 1998.

² Act 13 of 2002.

³ Act 75 of 1997.

⁴ Act 65 of 1996.

⁵ Act 25 of 2002.

⁶ N1.

⁷ ECPAT "Evaluation of South Africa" at <http://www.ecpat.net> (Date Accessed 1/09/05).

⁸ SALC *Trafficking in persons* Issue Paper 25, Project 131 (31 March 2004) 31. See Burgess & Grant (for the National Centre on Missing and Exploited Children) *Children Traumatized in Sex Rings* (March 1988) for further information on syndicated sex rings.

South Africa.⁹ Therefore, it is necessary to delve into the issue of child sex tourism as an organised crime, which in South African law is dealt with in terms of the Prevention of Organised Crime Act.

The Act can be utilized to prevent commercial sexual exploitation of children, child prostitution and child sex tourism itself.¹⁰ It is the most comprehensive Act dealing with offences related to trafficking for the purpose of sexual exploitation of children to be enacted thus far.¹¹

Primarily, the Act is aimed at the prohibition and criminalisation of certain gang related activities.¹² Any person who actively participates in gang related offences or is a member of a criminal gang¹³ and who willfully aids and abets any criminal activity committed for the benefit of a criminal gang,¹⁴ threatens to commit or perform any act of violence or any criminal activity by a criminal gang¹⁵ or threatens any specific person or persons in general with retaliation in any act or alleged act of violence,¹⁶ is guilty of an offence in terms of the Act. The provisions of this section therefore allow for the prosecution of gangs and gang members who traffic children for purposes of sexual exploitation in exchange for protection, which is one method of trafficking.¹⁷

Moreover, adult gang members who ensure and facilitate the access of others to a child for sex would be guilty of committing offences.¹⁸ Activities for which they can be convicted include rape, kidnapping, indecent assault, immoral or indecent acts with an underage person, soliciting or enticing an underage person to commit an immoral or indecent act, child theft or

⁹ Fitzgibbon "Modern-day slavery? The scope of trafficking in persons in Africa" 2003 *African Security Review* 81 83-85.

¹⁰ Koen *et al The Trafficking of Children for Purposes of Sexual Exploitation* (2000) 93.

¹¹ Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation-South Africa* (August 2000) 81.

¹² Chapter 4 of Act; Hesselink-Louw, Bezuidenhout & Boniface "South African Law and Child Prostitution: an Overview" 2004 *Stell LR* 364.

¹³ S 1 of the Act defines a "criminal gang" as including "any formal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences".

¹⁴ S 9(1)(a).

¹⁵ S 9(1)(b).

¹⁶ S 9(1)(c).

¹⁷ Molo Songololo n 11 page 82.

¹⁸ *Ibid* page 81.

conspiring to commit any one of these activities.¹⁹ These are all activities related to child sex tourism.

Also significant are the offences relating to patterns of racketeering activities, i.e. the planned, ongoing, continuous or repeated participation or involvement in any offence.²⁰ These offences include receiving, retaining, using or investing of any property that is directly or indirectly derived from a pattern of racketeering activities.²¹ It also covers the activities of enterprises, such as the managing of, the employment by, or association with such enterprises through a pattern of racketeering activities.²² Any person “who knows or ought to have reasonably known” of those offences while engaging in any of the above activities commits a crime.²³

The racketeering provisions would apply to any person who gains directly or indirectly, financially and/or non-financially, from activities such as child prostitution or trafficking in children for purposes of sexual exploitation. A pimp or any other facilitator of child sex who is knowingly and repeatedly involved in transferring, harbouring and offering children to others for sexual exploitation in exchange for money, could be also prosecuted in terms of this section. The same applies to a taxi driver, who repeatedly delivers children to places of sexual exploitation, since he or she “knows or ought to have reasonably known” of criminal offences being committed in respect of these children and therefore participates, directly or indirectly, in the commission on an offence.²⁴

Additionally, the Act prohibits money laundering, assisting another to benefit from the proceeds of unlawful activities, and the acquisition, possession or use of proceeds of unlawful activities.²⁵ Therefore any person who benefits whether directly or indirectly from acquiring, possessing or using the proceeds derived from child prostitution or trafficking of children for the purpose of sexual exploitation, whether financially and/or non-financially, commits an offence. A parent who sells a child to a pimp is guilty of obtaining proceeds of unlawful

¹⁹ Complete list contained in Schedule 1 of the Act .

²⁰ Chapter 2.

²¹ S 2(1)(a),(b) and(c).

²² S 2(1)(e).

²³ S 2(1)(f).

²⁴ Molo Songololo n 11 pages 81- 82.

²⁵ Ss 4 – 6.

activities as much as the pimp who acquires, possesses and uses the “proceeds” of unlawful activities, and the customer who benefits from such “proceeds”.²⁶

Furthermore, this Act provides for the recovery or confiscation of the proceeds wrongfully derived from unlawful activities (which would include child prostitution) as well as the civil forfeiture of criminal assets that have either been used to commit an offence or which are the proceeds of such an offence.²⁷ The profits acquired by pimps from child prostitution could be recovered and utilized in the rehabilitation of child prostitutes.²⁸

On the whole, this Act is of great significance in protecting children from child sex tourism as an organised crime and in addition it comprehensively covers the related issue of trafficking for the purpose of sexual exploitation of children. However, the conduct of a child sex tourist engaging in a sexual act with a child is not covered by this piece of legislation.

3. IMMIGRATION ACT²⁹

Less effective than the above Act in protecting child sex tourism victims is the Immigration Act, the purpose of which is to regulate the admission of persons into, their residence in, and their departure from South Africa.³⁰

This piece of legislation relates to cross-border, regional and international trafficking of children for the purpose of sexual exploitation. It can be applied for the deportation or prosecution of foreign criminal offenders and therefore can be regarded as a protective measure for sexually exploited and trafficked children.³¹

One of the most significant provisions impacting on child sex tourism is section 28(a) of the Act. This section provides for the withdrawal of a permanent residence permit if its holder, within four years of the issue of such permit, has been convicted of the offences of rape,

²⁶ Molo Songololo n 11 page 82.

²⁷ Ss 18 to 24 deal with confiscation.

²⁸ Hesselink- Louw *et al* n 12 page 364.

²⁹ N 2.

³⁰ Preamble.

³¹ Molo Songololo n 11 page 83.

indecent assault, kidnapping³² or the conspiracy or the incitement or attempt to commit any of these offences.³³

What is more, the Act stipulates that temporary or permanent residency permits will not be issued to “prohibited persons”.³⁴ These include foreigners against whom a warrant is outstanding or a conviction has been secured for the offences of torture, drug trafficking, money laundering or kidnapping,³⁵ either in South Africa or a country with which the South Africa has diplomatic relations.³⁶ Foreigners who are members of an association or organisation advocating the practice of social violence are also categorised as such.³⁷ A foreigner with previous criminal convictions without the option of a fine, for conduct which would be an offence in the Republic, may be declared to be an “undesirable” person in terms of the Act.³⁸ This could serve in keeping convicted child sex tourists from entering South Africa.

Unfortunately, in relation to child trafficking for the purpose of sexual exploitation, the Act is not “victim friendly”.³⁹ A provision that will surely deter any person from assisting a victim of trafficking who is illegally in the country⁴⁰ is section 42, which states that no person may in any manner aid, abet, assist or enable an illegal foreigner.⁴¹ The Act provides further that it would not be a defence for any person to claim that he or she did not know the status of the foreigner concerned, or whether he or she was an illegal foreigner, if it is proved that the accused ought reasonably to have known this information.⁴² This will negatively impact on foreign victims of child sex tourism found within the Republic.

The Act states that an illegal foreigner must be deported⁴³ and that an immigration officer may, without a warrant, arrest an illegal foreigner and deport him or her or cause him or her to

³² The offences of rape, indecent assault and kidnapping are expanded on in Chapter 3, par 3.

³³ See Schedule 1 for full list.

³⁴ S 29(1).

³⁵ See Schedule 1 for full list.

³⁶ S 29(1)(b).

³⁷ S 29(1)(d).

³⁸ S 30(1)(g).

³⁹ SALC n 8 page 34.

⁴⁰ *Ibid.*

⁴¹ S 42(1)(a).

⁴² S 42(2).

⁴³ S 32(2).

be deported.⁴⁴ However, there is criticism by the SALC of the fact that this provision will apply in the same way to a victim of trafficking who has entered the country without the required documentation and is therefore also an illegal foreigner. These victims are in a sense victimised twice: Firstly, they are deceived and trafficked into the country and secondly, they are discriminated against by the police and immigration officials on the basis that they are illegal immigrants.⁴⁵ Unfortunately, the Act fails to provide for the protection of the child survivor of trafficking for the purpose of sexual exploitation.⁴⁶ The Children's Act, as pointed out in chapter 4, addresses these shortcomings.

To reiterate, the Immigration Act falls short in giving adequate protection to foreign children in South Africa who are victims of child sex tourism.

4. THE BASIC CONDITIONS OF EMPLOYMENT ACT⁴⁷

As pointed out in Chapter 1, another serious problem linked to child sex tourism is the issue of child labour.

The majority of South African children are economically vulnerable.⁴⁸ It is estimated that there are about 10 000 to 12 000 children living and working on the streets.⁴⁹ In this context, children are often willing to exchange almost anything they can for the basic necessities of survival and often the only thing they can trade is sexual access to their bodies. The sex trade in South Africa feeds on human suffering by exploiting poverty. Women and children are particularly vulnerable in this regard.⁵⁰

⁴⁴ S 34(1).

⁴⁵ SALC n 8 page 34.

⁴⁶ Molo Songololo n 11 page 84. See recommendations in Shahinian (Director of Centre for Gender Studies 'Democracy Today') *Trafficking in Women and Girls* (8 November 2002) 9, compiled for Expert Group Meeting on trafficking from 18-22 November in New York, USA.

⁴⁷ N 3.

⁴⁸ Webster *The Protection of Children from Violence* (July 2001), Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England, September 2001.

⁴⁹ Streak "The extent and provincial distribution of poverty in South Africa 2000" in *Are the Poor Children being put first? Child Poverty and the Budget 2000* (2000) 7, produced by the Budget Information Service of IDASA (The Institute for Democracy in South Africa).

⁵⁰ O'Connell Davidson & Sanchez Taylor *Child Prostitution and Sex Tourism: South Africa* (1996) 4-5. This research paper was prepared for ECPAT as part of a series of papers undertaken as preparation for the World Congress Against the Commercial Sexual Exploitation of Children.

Research conducted by ECPAT has revealed that there are growing numbers of massage parlours, escort agencies, hostess clubs and brothels in South Africa which profit directly from the prostitution of young girls.⁵¹ The owners, managers and doormen in clubs and agencies who were interviewed for the study insisted that very *few* underage girls, if any, are used for these purposes. However, the prostitutes who were interviewed indicated that women applying for work were merely asked “How old are you?” The answer they give suffices and there are no further checks. Consequently, as long as an underage prostitute looks over 18 she would be “employed”. Other informants revealed that managers and owners of the more ‘classy’ agencies and clubs are often involved in the prostitution of “much younger girls” although not necessarily on their business premises.⁵²

In this same research study, the owner of a hostess club in Cape Town also owned a guest house and encouraged the male tourists staying in it to make use of ‘his’ hostesses. One hostess club manager showed the ECPAT researchers an advertisement for hostesses which he had placed in *The Eastern Province Herald*, a newspaper covering the entire Eastern Cape Province, in which he expressly mentioned that they would earn extremely well and work in an upmarket establishment. He boldly admitted to using the advertisement as a ploy to lure girls from out of town, who would be put up in very expensive accommodation on arrival and then told that they owed him the money for the fares to Cape Town and for their accommodation. The “debt” keeps the girls bonded to him and their isolation in a new town makes it extremely difficult to escape. The girls are often kept under control by supplying them with drugs.⁵³

Research conducted by the ILO highlights the trafficking of South African children for purposes of domestic work within the country.⁵⁴ Reports reveal that a large segment of the children working in domestic services are being systematically exploited and abused by their employers.⁵⁵ The global demand for cheap labour contributes to the trafficking in children into various economic sectors⁵⁶ but, in South Africa, it is the agricultural sector that is particularly exploitative and heavily dependent on child labour. In 1999, an estimated 1.4

⁵¹ O’Connell Davidson & Sanchez Taylor n 50 page 4.

⁵² *Ibid* page 5.

⁵³ *Ibid*.

⁵⁴ International Labour Organisation *South Africa – Child Domestic Workers: a National Report* (May 2002), as compiled by Debbie Budlender and Dawie Bosch.

⁵⁵ O’Connell Davidson & Sanchez Taylor n 50 page 11.

⁵⁶ SALC n 8 page 20.

percent of the 13.4 million children aged five to 17 in South Africa were involved in commercial agriculture.⁵⁷ This provides for opportunities for exploitation by farmers. Reports indicate that certain white farmers are “paying” for sexual access to young girls with toiletry items such as deodorant or shampoo and that many children are being sexually abused by farmers upon whom their families are entirely dependent for wages and accommodation.⁵⁸ These exploitative circumstances increase the vulnerability of many such children to child sex tourism.

According to ILO studies, children constitute ten to 15 percent of the tourism industry’s labour market.⁵⁹ This could be explained by the deepening poverty, lack of educational opportunities and growing economic pressure facing children worldwide. Many children working in the tourism industry face increased vulnerability to sexual exploitation.⁶⁰

The South African legal system protects children from exploitative practices in the Basic Conditions of Employment Act. Chapter 6 of the Act provides for the prohibition of employment of children and forced labour. Section 43 (1) of the Act makes it an offence for any person to employ a child under the age of 15 years⁶¹ or who is under the minimum school-leaving age in terms of any law, if this is 15 years or older.⁶² The Act goes further by making it an offence to employ children where such employment is inappropriate for a person of that age⁶³ or places at risk a child’s well being, education, physical or mental health, or moral or social development.⁶⁴

In addition, the Act prohibits all forced labour⁶⁵ and highlights that “no person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour”.⁶⁶

⁵⁷ StatsSA *Survey of Activities of Young People in South Africa* (1999).

⁵⁸ O’Connell Davidson & Sanchez Taylor n 50 page 10.

⁵⁹ ILO *The Twilight Zone: Child Workers in the Hotel, Tourism and Catering Industry* (1995).

⁶⁰ Swiss Agency for Development and Cooperation *Easy Money: a Report on Child Labour in Tourism* (1999). This report is based on information provided from consultations with over 300 experts worldwide.

⁶¹ S 43(1)(a). S 43 is in line with the ILO’s Minimum Age Convention No 183 of 1973, see *National Report on Follow-up to the World Summit for Children* (December 2000) 13, submitted by the National Programme for Action for Children Steering Committee through the Office on the Rights of the Child in the Presidency.

⁶² S 43(1)(b). S 31(1) of the South African Schools Act 84 of 1996, requires every parent to cause every learner for whom he or she is responsible to attend a school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is the first.

⁶³ S 43(2)(a).

⁶⁴ S 43(2)(b).

⁶⁵ S 48(1).

⁶⁶ S 48(2).

Child prostitution and any form of child trafficking for the purpose of sexual exploitation should automatically be regarded as “forced labour” and therefore be prosecutable under this provision.⁶⁷ These provisions are in line with South Africa’s international and constitutional obligations.⁶⁸

Even though child sex tourism, child prostitution and trafficking of children for the purpose of sexual exploitation are not regarded as “work” or “employment” in the common understanding,⁶⁹ the above sections can be applied to protect children from these forms of exploitation. Children who forced by traffickers, pimps or hotel owners (i.e. the “employer”) into circumstances that allow sexual exploitation (i.e. “work” in the sex industry) are being placed in circumstances that endanger their well-being.⁷⁰

In effect, the Act can be applied against pimps, hotel owners, bar owners and other such role players in child sex tourism, who “employ” children to provide sexual services. However, the customers who are making use of the “services” of children such as child sex tourists would escape liability in terms of this Act.

5. FILMS AND PUBLICATIONS ACT ⁷¹

An additional problem linked to the increase in child sex tourism is the increased use of the Internet and resultant boost in access to child pornography.⁷² The Internet provides a contemporary avenue for sexual predators to gain access to victims. As mentioned in Chapter 1, there has been an increase in the use of the Internet as a marketing tool for organised child sex tours, thereby contributing to the expansion of the child-sex industry.⁷³ Travel agents for child sex tours often publish brochures which cater for child sex tourists on the Internet. The

⁶⁷ ILO Report VI (1) to International Labour Conference 86th session (1998) 66; Fitzgibbon n 9 page 86; Fraser-Moleketi “Children involved in Prostitution”, speech at HSRC (10 March 1995); Molo Songololo n 11 page 76.

⁶⁸ In terms of the ILO Convention on the Worst Forms of Child Labour No.182 of 1999 and s 28(1)(e) of the Constitution.

⁶⁹ Nogushi *Child Labour and Child Exploitation*, Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England (September 2001) 3.

⁷⁰ Molo Songololo n 11 page 76.

⁷¹ Act 65 of 1996, as amended by Act 34 of 1999.

⁷² Willis & Levy “Child prostitution: global health burden, research needs, and interventions” 2002 *The Lancet* 1417 1417; For more on Internet paedophilia, see Spies (ed) *Sexual Abuse: Dynamics, assessment & healing* (2006) 23-36; Bartol & Bartol *Criminal behaviour: a Psychosocial Approach* (2005) 31.

⁷³ See UCBS's SexInfo Sex tourism" at <http://www.soc.ucsb.edu/sexinfo/?article=violence&refid=018> (Date accessed: 24/04/03).

Internet is also used by child sex tourists to locate venues where children are available for prostitution.⁷⁴ The accessibility of this information assists child sex tourists in making their travel plans. The spread of child pornography over the Internet has also contributed to the growth of the child sex trade⁷⁵ in that it generates interest in child sex tourism⁷⁶ and is often used by sexual predators to “groom” child victims.⁷⁷

The principal Act dealing with on-line pornography is the Films and Publications Act.⁷⁸ Most importantly, the possession and production of child pornography is strictly prohibited by the Act.⁷⁹ The Act defines child pornography as including “any image, real or simulated, however created, depicting a person who is or who is described as being under the age of 18 years, engaged in sexual conduct or showing or describing the body of such a person in a manner which amounts to sexual exploitation”.⁸⁰ Any person who is in possession of, creates, produces or imports “a film or publication which contains child pornography or advocates, advertises or promotes child pornography or the sexual exploitation of children”⁸¹ commits an offence. Opportunities for sex exploiters to “buy” children for purposes of sexual exploitation are often advertised on the Internet and this situation is catered for by the Act.⁸²

Adding support to this, section 28(1) prohibits the act of “knowingly” distributing certain publications containing child pornography.⁸³ “Distribution” would include selling, hiring out, offering and for purposes of certain sections, the handing out or exhibiting of a film or publication to a person under the age of 18 years.⁸⁴

A noteworthy development in the fight against child pornography, was the introduction of section 27A into the Act in 2004. This section requires the registration of every Internet

⁷⁴ TED Case Studies “Nepal sex trade” at <http://www.american.edu/projects/mandala/TED/nepalsex.htm> (Date accessed: 27/10/05).

⁷⁵ US Department of Justice “Sex tourism” at <http://www.usdoj.gov/criminal/ceos/sextour.html> (Date accessed: 26/10/05).

⁷⁶ *Ibid.*

⁷⁷ SALC *Report on Sexual Offences* Project 107 (December 2002) 299 (Available on Internet at www.law.wits.ac.za/salc/salc.html) (Date accessed: 15/05/03).

⁷⁸ Burns *Communications Law* (2001) 403.

⁷⁹ Haupt “The importance of protecting children against the dark side of the Internet: A Legal Perspective” 2001 *Child abuse research in South Africa* 21 26.

⁸⁰ S 1. See Commission on Human Rights *Rights of the Child*, a Report submitted by Mr. Juan Miguel Petit, Special Rapporteur on the sale of children, child prostitution and child pornography (23 December 2004).

⁸¹ S 27(1)(a).

⁸² *Ibid.*

⁸³ As contained in Schedule 1, read with Schedule 5 of the Act.

⁸⁴ S 1.

service provider⁸⁵ with the Films and Publications Board.⁸⁶ Service providers must “take all reasonable steps” to prevent the use of their services for hosting or distributing child pornography.⁸⁷ Once they are aware of it, they are required to report the presence of child pornography to the SAPS.⁸⁸ They will face criminal prosecution if they fail to block access to child pornography by any person once they have been informed of its presence.⁸⁹ In *De Reuck v DPP*,⁹⁰ Deputy Chief Justice Langa, stated that one of the purposes of section 27 of the Act is to prevent the grooming of children for sexual abuse via the Internet.

Notably, producing, distributing and possessing child pornography now constitute separate offences⁹¹ carrying a maximum sentence of ten years imprisonment each.⁹² Theoretically a child pornographer who produced, possessed and distributed child pornography could be sentenced to 30 years imprisonment. Previously, these offences amounted to one offence carrying a maximum jail term of just five years.⁹³

In effect, the amendments to the Films and Publications Act are hard-hitting and significantly improve on the protection of children from child pornography and child sex tourism facilitated via the Internet.

6. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT⁹⁴

Also related to Internet crime is the Electronic Communications and Transactions Act. The Internet, as the fastest growing and most unregulated communication network in the world, is contributing to the expansion of the sex trade.⁹⁵ The increased use of the Internet as a forum

⁸⁵ In order to connect to the Internet, an Internet user must subscribe to the service of an Internet service provider. The connection between the user's computer and the Internet service provider via a modem is what establishes access to the Internet. See 101 Website Advise “What is the Internet” at <http://www.anownsite.com/local-business/what-is-internet.html> (Date accessed: 20 April 2004).

⁸⁶ S 27A(1)(a); s 27(A) by Films and Publications Amendment Act 18 of 2004.

⁸⁷ S 27(A)(1)(b).

⁸⁸ S 27(A)(2)(b).

⁸⁹ S 27(A)(2)(a).

⁹⁰ *De Reuck v Director of Public Prosecutions Witwatersrand Local Division*, 2004 (1) SA 406 (CC); 2003 (2) SACR 455.

⁹¹ Statement made by Iyavar Chetty, the acting chief executive officer of the Film and Publication Board.

⁹² S 30(1)(A) inserted by the Films and Publications Amendment Act 18 of 2004.

⁹³ Carew “Government clamps down on child pornography” at <http://www.iol.co.za> (Date accessed: 18/01/2006).

⁹⁴ N 5.

⁹⁵ Barnes-September et al *Child victims of Prostitution in the Western Cape* (2000) 40, as compiled for the Institute for Child and Family Development, University of the Western Cape.

for selling people for the purposes of sexual exploitation makes the uncovering of such activities all the more difficult.⁹⁶

The regulation of the gathering of computer-related evidence to be used in criminal proceedings against such sex offenders is therefore of vital importance. The admissibility and evidential value of computer-related evidence is regulated by the Electronic Communications and Transactions Act.⁹⁷

In terms of section 15 of the Act, information in the form of a data message⁹⁸ “must be given due evidential weight”.⁹⁹ The rules of evidence must not be applied in a way that denies the admissibility of a data message as evidence merely on the grounds that it is constituted by a data message;¹⁰⁰ or “if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form”.¹⁰¹

In giving evidential weight to a data message, regard must be had to the reliability of the way in which the data message was “generated, stored or communicated”; the reliability of the way in which the integrity of the data message was maintained and the manner in which the originator of the data was identified.¹⁰² In terms of the Act, a data message made by a person “in the ordinary course of business”, or a certified copy or printout of or an extract from a data message, is on its mere production in civil, criminal, or administrative proceedings under any law, admissible as evidence against any person and rebuttable proof of the facts contained therein.¹⁰³

Furthermore, the Act establishes cyber inspectors who are given wide and invasive powers of search and seizure in relation to computer-related investigations.¹⁰⁴ They are empowered to monitor and inspect any website or any activity on an information system “in the public domain” and report any unlawful activities to the police. Cyber inspectors may obtain the

⁹⁶ SALC n 8 page 43.

⁹⁷ *Ibid.*

⁹⁸ S 1 of the Act defines a “data message” as “data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction and a stored record”.

⁹⁹ S 15(2).

¹⁰⁰ S 15(1)(a).

¹⁰¹ S 15(1)(b).

¹⁰² S 15(3).

¹⁰³ S 15(4).

¹⁰⁴ Ss 80-84; Schwikkard *et al Principles of Evidence* (2002) 386.

assistance of the SAPS in performing their duties, for example, in obtaining warrants to search an individual's premises or gain access to computers which are connected to the commission of an offence.¹⁰⁵ Police will have to ensure that the authenticity of the evidence is preserved in order to ensure that a high evidential value is attached to a data message.¹⁰⁶

Resultantly, these provisions will assist in gathering and utilising computer-related evidence in legal proceedings against child sex tourists who use the Internet as a forum to advertise or facilitate sex tours as well as child pornographers.

7. CONCLUSION

There are many commendable provisions contained in miscellaneous pieces of legislation which protect children from child sex tourism, some being more effective than others.

Most impressive is the Prevention of Organised Crime Act. It is particularly effective in that it can be used to prevent the commercial sexual exploitation of children, child prostitution and child sex tourism itself as an organised crime.¹⁰⁷ It is the most comprehensive Act dealing with trafficking in children for the purpose of sexual exploitation to be enacted thus far¹⁰⁸ and impacts on the conduct of parents, pimps, brothel owners and other facilitators of child sex tourism.

Less effective is the Immigration Act. The Act is useful in that it can be applied for the deportation or prosecution of foreign sex offenders¹⁰⁹ however it is not "victim-friendly"¹¹⁰ and does allow for the secondary victimization of child sex tourist victims.¹¹¹

Importantly, the Basic Conditions of Employment Act provides for the prohibition of employment of children and forced labour.¹¹² The Act makes it an offence to employ children where such employment is inappropriate for a person of that age¹¹³ or places the child's well

¹⁰⁵ Cohen "Cyber-crime: Hacking and Phishing Offenders under Fire" 2005 *SA Computer Magazine* 92 92.

¹⁰⁶ S 81(2); SALC n 8 page 44.

¹⁰⁷ Koen *et al* n 10 page 93.

¹⁰⁸ Molo Songololo n 11 page 81.

¹⁰⁹ Ss 28 and 29.

¹¹⁰ SALC n 8 page 34.

¹¹¹ *Ibid.*

¹¹² Chapter 6.

¹¹³ S 43(2)(a).

being at risk.¹¹⁴ These provisions are effective against the role players who “employ” children to provide sexual services but not against the child sex tourists who make use of the “services” of these children.

Also noteworthy is the Films and Publications Act which covers offences such as the advocating, advertisement or promotion of child pornography or the sexual exploitation of children.¹¹⁵ The Act also criminalizes the failure by service providers to block access to child pornography once they are aware of its presence or to report the presence of child pornography on the Internet.¹¹⁶ Related to these provisions is the Electronic Communications Act which provides for the regulation of the gathering of computer-related evidence to be used in criminal proceedings against such child sex tourists. These provisions impact on the conduct of child sex tourists, child pornographers and Internet service providers as role players in child sex tourism.

Overall the impact of these pieces of legislation on child sex tourism is praiseworthy. However, what is apparent is that legislative provisions protecting children from commercial sexual exploitation are fragmented. There are numerous statutes, each dealing with one aspect of child protection as opposed to a single comprehensive statute to refer to in handling all these issues.¹¹⁷ Also, for the most part, children are dealt with under the same provisions that apply to adults instead of being afforded special protection by the law. Therefore there is still room for improvement in this regard.

¹¹⁴ S 43(2)(b).

¹¹⁵ S 27(1)(a).

¹¹⁶ S 27A.

¹¹⁷ IOM “The Risks of Specialised Human Trafficking Legislation” August 2004 *Eye on Human Trafficking* 4.

CHAPTER 6

CONCLUSION

Child sex tourism is a repugnant and intolerable crime that preys on the innocence and vulnerability of children. All children deserve to be protected from it. After all,

“[t]he children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their childhood should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and cooperation...”¹

The South African government is under an international obligation to create structures and implement mechanisms and resources to combat child sex tourism. The provisions of the international instruments relating to child sex tourism are laudable in that they impact on the various role players in child sex tourism. South Africa has adopted specific constitutional provisions regarding the status of these international instruments in South African law, thus making them applicable to child protection on a national level.

South Africa's national laws are praiseworthy in many respects in that they tackle various aspects of child sex tourism and target sex exploiters, child traffickers and child pornographers. However, there are far too many loopholes. The Sexual Offences Act and common law do not specifically deal with child sex tourism or child trafficking. As a result, there are no specialised measures to facilitate the investigation and prosecution of these offences or assist the victims of such offences.² Children are mainly dealt with under the same provisions that apply to adults. Child protection legislation does not explicitly cover the facilitation of the sexual exploitation of children. Activities such as child trafficking are not specifically addressed and the definition of a “child in need of care and protection” in the Child Care Act allows many victims or potential victims of child sex tourism to fall through

¹ World Declaration on the Survival, Protection and Development of Children: World Summit for Children 30 September 2001.

² SALC *Sexual Offences: Adult Prostitution* Project 107 (31 October 2002) 84.

the cracks. Also, there are numerous statutes each dealing with different aspects of child sex tourism as opposed to a single comprehensive statute to refer to in handling these cases.³

On a positive note, the new Sexual Offences Bill makes noteworthy improvements to the definition and management of sexual offences against children in South Africa. It deals with sexual offences against children separately from offences against adults, thereby affording children the special protection they deserve. Moreover, the Bill contains specific provisions on child sex tourism and extraterritorial application of laws couched in gender-neutral terms thereby affording protection for all child sex tourism victims. Ultimately, the Bill aims to provide all complainants of sexual offences with the maximum protection that the legal system can provide.

The Children's Act as a whole is a milestone for the protection of children's rights in South Africa. It is a thorough piece of legislation that holistically addresses the needs of children in relation to prevention of and protection from abuse. Once enforced, it will ensure that fewer children are vulnerable to sex tourism and that those who are already victims of it receive the needed care.

It is expected that the Children's Act and the Sexual Offences Bill will bring about positive changes⁴ in the way child sex tourism is dealt with in South African law. Government needs to make the passing and/or enforcement of these new laws a priority. However, it will be up to the relevant Ministries, government departments and law enforcement agencies involved to develop new detailed policies protocols and standards of practice or to modify existing practices to coincide with the progressive legal reform to ensure that the new laws are more than mere blunt instruments in dealing with child sex tourism in South Africa.⁵ In addition, the assistance and involvement of the tourism industry and NGO's, methods of co-operating with relevant agencies abroad and the execution of programs to eradicate the root causes of child sex tourism, must accompany the improvements made to the substantive law.

³ IOM "The Risks of Specialised Human Trafficking Legislation" August 2004 *Eye on Human Trafficking* 4.

⁴ ECPAT "Evaluation of South Africa" at <http://www.ecpat.net> (Date Accessed 1/09/05).

⁵ SALC *Report on Sexual Offences* Project 107 (December 2002) 7 (Available on Internet at www.law.wits.ac.za/salc/salc.html) (Date accessed: 15/05/03).

BIBLIOGRAPHY

BOOKS

Bantekas I and Nash S *International Criminal law* (2ed) (2001) Cavendish Publishing Limited

Bartol CR & Bartol AM *Criminal behaviour: a Psychosocial Approach* (7ed) (2005) Upper Saddle River, NJ: Pearson

Burchell J *Principles of Criminal Law* (3ed) (2005) Juta & Co Ltd

Burchell J and Milton J *Principles of Criminal Law* (1997) Juta & Co Ltd

Burns Y *Communications Law* (2001) LexisNexis Butterworths Durban

CDS (eds) *International Conference on the Rights of the Child: Papers and Reports of a Conference Convened by the Community Law Centre Cape Town, June 1992* (1992)

Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* (2002) Butterworths: Durban

Currie I & de Waal J *The Bill of Rights Handbook* (5ed) (2005) Juta & Co Ltd

Dixon M. *International Law* (5ed) (2005) Oxford University Press

Dugard J *International law: A South African Perspective* (3ed) (2005) Juta & Co Ltd

Evans MD (ed) *International Law* (2003) Oxford University Press

Fottrell D (ed) *Revisiting Children's Rights* (2000) The Hague: Kluwer Law International

Hollis DB, Blakeslee MR and Ederington LB (ed) *National Treaty Law and Practice* (2005) Martinus Nijhoff Publishers

Jennings R & Watts A (eds) *Oppenheim's International Law: A Treatise Vol I-Peace* (1992) Longmans

Keightley R (ed) *Children's Rights* (1996) Kenwyn Juta

Kelsen H *Principles of International Law* (1966) New York: Holt, Rinehart & Winston

Koen, Van Vuuren & Anthony *The Trafficking of Children for Purposes of Sexual Exploitation* – South Africa 2000

Lawrence TJ *Principles of International Law* (1905) Boston: Heath

Maryan Green NA *International Law* (1987) Pitman Publishing

Milton EM & Hunt PMA *South African Criminal Law and Procedure* (1997) Kenwyn Juta

Ozmanczyk EJ *Encyclopedia of the United Nations and International Agreements* (3ed) (2003) New York: Routledge

Seabrook J *No hiding place: Child sex tourism and the role of extra-territorial legislation*, (2000) London: Zed Books

Schwarzenberger G *A Manual of International Law* (1967) Published under the auspices of London Institute of World Affairs

Schwikkard PJ & van der Merwe SE in collaboration with Collier DE *Principles of Evidence* (2002) Lansdowne: Juta

Snyman CR *Criminal Law* (2ed) (1989) Butterworths: Durban

Spies GM (ed) *Sexual Abuse: Dynamics, assessment & healing* (2006) Van Schaik Publishers

Stilwell *Battered Women: Legal Remedies of Domestic Violence* 2001

Von Glahn G *Law Among Nations : An Introduction to Public International Law* (7ed) (1996) Allyn and Bacon

ARTICLES IN JOURNALS

Anon “Children as a saleable commodity” 22-29 December 2001 *The Lancet* 2095

Anon “Quick hits: Sex in the News: South Africa a haven for sex tourists” May 2003 *Contemporary Sexuality* 8

Artz L & Combrink H “‘A wall or words’: Redefining the offence of rape in South African Law” 2003 *Acta Juridica* 72

Barnitz L “Effectively Responding to the Commercial Exploitation of Children: A Comprehensive approach to prevention, protection, and reintegration services” 2001 *Child Welfare* 597

Botha N “Incorporation of treaties under the Interim Constitution: a pattern emerges?” 1995 *SAYIL* 196

Cohen M “Cyber-crime: Hacking and Phishing Offenders under Fire” 2005 *SA Computer Magazine* 92

Davel T 2002 “The African Charter on the Rights and Welfare of the Child, Family Law and Children’s Rights” *De Jure* 281

Fitzgibbon K “Modern-day slavery? The scope of trafficking in persons in Africa” 2003 *African Security Review* 81

Gould C “Countering Human Trafficking: Considerations and Constraints” June 2006 *SA Crime Quarterly* 19

Haupt L “The importance of protecting children against the dark side of the Internet: A Legal Perspective” 2001 *Child abuse research in South Africa* 21

Healy MA “Prosecuting child sex tourists at home: Do laws in Sweden, Australia and the United States safeguard the rights of children as mandated by International Law?” 1995 *Fordham International Law Journal* 1852

Hesselink-Louw AM, Bezuidenhout C & Boniface AE “South African Law and Child Prostitution: an Overview” 2004 *Stell LR* 352

Hodgson D “Sex tourism in child prostitution in Asia: Legal responses and strategies” 1994 *Melbourne University Law Review* 512

Jackson B “Children’s Rights World Congress” 2005 *UN Chronicle* 35

Jeffreys “Globalizing sexual exploitation: sex tourism and the traffic in women” 1999 *Leisure Studies* 179

Kaime T “The Convention on the Rights of the Child and the cultural legitimacy of Children’s Rights in Africa: Some Reflections” 2005 *African Human Rights Law Journal* 221

King M “Against children’s rights” 1996 *Acta Juridica* 28

Kruger “Sex Work from a Feminist Perspective: a Visit to the *Jordan* case” 2004 *SAJHR* 138

Laschinger K “Sex in the (Mother) City” 25 February 2004 *Finance Week* 13

Le Roux W “Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition” 2003 *SALJ* 452

Lloyd A “A theoretical analysis of the reality of children’s rights in Africa: An introduction to the Africa Charter on the Rights and Welfare of the Child” 2002 *African Human Rights Law Journal* 11

Louw R “Specific Crimes: sexual offences” 2002 *SACJ* 376

Madotyeni Z “States must give meaning to treaty” April/May 2000 *ChildrenFirst* 30

Maluwa T “The incorporation of international law and its interpretational role in municipal legal systems in Africa: an exploratory survey” 1998 *SAYIL* 45

Munir AB & Yasin S “Commercial Sexual Exploitation” 1997 *Child Abuse Review* 147

Noguchi Y “ILO Convention No, 182 on the worst forms of child labour and the Convention on the Rights of the Child” 2002 *International Journal of Children’s Rights* 355

Olowu D “Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child” 2002 *The International Journal of Children’s Rights* 130

Olivier M “The status of international law in South African municipal law: section 231 and the 1993 Constitution” 1993/94 *SAYIL* 1

Pantazis A “Notes on male rape” 1999 *SACJ* 369 370

Rosa & Dutschke “Child rights at the core: The Use of International Law in South African Cases on Children’s Socio-economic Rights” 2006 *SAJHR* 224

Schlagenhauf “Unicef report documents sexual exploitation of children” 8 November 2003 *The Lancet* 1556

Scott C & Alston P “Adjudicating constitutional priorities in a transnational context: a comment on Soobromoney’s legacy and Grootboom’s promise” 2000 *SAJHR* 206

Sloth Nielsen J “Ratification of the UN Convention on the Rights of the Child: Some implications for South African Law” 1995 *SAJHR* 401

Sloth Nielsen J “Chicken soup or chainsaws: some implications of the constitutionalisation of children’s rights in South Africa” 1996 *Acta Juridica* 6

Snell CL “Commercial Sexual Exploitation of Youth in South Africa” 2003 *The Journal of Negro Education* 506

UNICEF “Sexual exploitation: destroying the lives of millions of children” 1995 *Salus* 14

Van Bueren G “A new children’s treaty” 1991 *International Children’s Rights Monitor* 20

van Reenen TP “The right to development in international and municipal law” 1995 *SAPR/PL* 417

van Vuuren B “South African Children for Sale” 2000 *New Agenda* 15 15

Viljoen F “Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” 1998 *CILSA* 199

Willis BM & Levy BS “Child prostitution: global health burden, research needs, and interventions” 2002 *The Lancet* 1417

CONVENTIONS, DECLARATIONS & RESOLUTIONS

African Charter on the Rights and Welfare of the Child (1990) OAU Doc.CAB/LEG/24.9/49

Declaration and Agenda for Action from the World Congress against the Commercial Exploitation of Children, Stockholm, Sweden 1996

ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No 182 of 1999

ILO's Minimum Age Convention No 183 of 1973

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (Available at <http://www.unhchr.ch/html/menu2/dopchild.htm> (Date accessed: 13 September 2004)

Optional Protocol to the Convention on the Elimination of all Forms of Discrimination (2000) A/Res/54/4

The Vienna Convention on the Law of Treaties of 1969

United Nations Convention against Transnational Organised Crime, UN Doc A/55/383 (2000)

United Nations Commission on Human Rights resolution on the Rights of the Child 2002/92 (Available on Internet at [http://www.unhchr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.RES.2002.9...](http://www.unhchr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.RES.2002.9...) (Date accessed: 26/02/03)

United Nations Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GOAR, 34th Sess., No 46, UN Doc A/34/35 (1980)

United Nations Convention on the Rights of the Child, 20 November 1989, G.A. Res. 44/25 (Available on Internet at <http://www.hri.ca/uninfo/treaties/25.shtml>) (Date accessed: 19/03/03)

United Nations Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others, 2 December 1949, G.A. Res 317 (IV) of 2 December 1949, U.N.DocA/1251(1949) (also Available on Internet at <http://www.unhchr.ch/html/menu3/b/33.htm>) (Date accessed: 20/03/2003)

United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, UN Doc A/55/383 (2000) Annex 1

UNITED NATIONS & ILO DOCUMENTS

Commission on Human Rights *Rights of the Child*, a Report submitted by Mr. Juan Miguel Petit, Special Rapporteur on the sale of children, child prostitution and child pornography (23 December 2004)

ILO *The Twilight Zone: Child Workers in the Hotel, Tourism and Catering Industry* (1995)

ILO Report VI (1) to International Labour Conference 86th session (1998)

ILO South Africa – *Child Domestic Workers: a National Report* (May 2002), as compiled by Debbie Budlender and Dawie Bosch

Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, United Nations Economic and Social Council, Commission on Human Rights, 52d Sess., Agenda Item 20, U.N. Doc. E/CN.4/1996/100 (1996)

State Party Report by South Africa (CEDAW/C/ZAF/1) of 5 February 1998

State Party Report by South Africa (CRC/C/51/Add.2) of 22 May 1999

REPORTS BY THE SOUTH AFRICAN LAW COMMISSION

Report on Sexual Offences (December 2002) Project 107 (Available on Internet at www.law.wits.ac.za/salc/salc.html)
(Date accessed: 15/05/03)

Report on the Review of the Child Care Act (December 2002) Project 110 (Available on Internet at www.law.wits.ac.za/salc/salc.html)
(Date accessed: 15/05/03)

Sexual Offences against Children Issue Paper 10 (May 1997) Project 108

Sexual Offences: Adult Prostitution Issue Paper 19 (31 October 2002) Project 107

Sexual Offences: the substantive law Discussion Paper 85 (12 August 1999) Project 107

Trafficking in persons Issue Paper 25 (31 March 2004) Project 131

NEWSPAPERS, MAGAZINES & BULLETINS

Davids “Small change for child molester” 4 December 2005 *Sunday Times*

IOM “South Africa Criminalises Child Trafficking” July 2005 *Eye on Human Trafficking*

IOM “The Risks of Specialised Human Trafficking Legislation” August 2004 *Eye on Human Trafficking*

IOM “SA Women lured into forced labour in Israel” October 2006 *Eye on Human Trafficking*

Makgalemele T, Badat N & Ajam K “Sex tourist facing a civil claim” 28 January 2006 *The Star*

Merten M “Sex tourism conference fails to draw officials” 19-25 October 2001 *Mail & Guardian*

Molwedi “Swiss sex tourist 'traumatised' by case, court told” 30 November 2005 Cape Times

Rank “Sex Bill’s approval welcomed by NGO’s” 5 May 2006 *The Herald*

Smith C “Sex tourism begins in SA” 12-18 October 2001 *Mail & Guardian*

TREATISES & DISSERTATIONS

Smallberger R *The extent and impact of sex tourism in certain metropolitan areas in South Africa* (1999)

OTHER DOCUMENTS

Alexander H (SWEAT), Paper presented on *Realities and Responsibilities: Tourists and the Sex Industry in Cape Town, SA* (October 2001)

Barnes-September et al *Child victims of Prostitution in the Western Cape* (2000), as compiled for the Institute for Child and Family Development, University of the Western Cape

Burgess AW & Grant CA (for the National Centre on Missing and Exploited Children) *Children Traumatized in Sex Rings* (March 1988)

Department of Justice Constitutional Development *Report to the Joint Monitoring Committee on the Improvement of Quality of Life and Status: Resources for Implementing Acts and Programmes* (4 April 2003)

Dionne P *Legal and Judicial aspects: Extraterritorial law and Extradition*, a presentation made by the Director –General of the International Bureau for Children’s Rights

ECPAT, Australia, *Educational Appeal* 1994 (leaflet)

ECPAT *Enforcing the Law Against the Commercial Sexual Exploitation of Children*, a Report of the International Consultation held at Rama Gardens Hotel, Bangkok, Thailand, January 17-19, 1996 as part of the preparation for the World Congress Against Commercial Sexual Exploitation of Children to be held in Stockholm, Sweden, August 1996

Fraser-Moleketi “Children involved in Prostitution”, Speech at HSRC (10 March 1995)

Follentine S, A Response by the Department of Social Services *Sexual Exploitation of Children* 16 October 2001

Gose M *The African Charter on the Rights and Welfare of the Child* (2002), a publication of the Children’s Rights Project: Community Law Centre

Government of the Republic of South Africa *Action Plan to Prevent and Combat the Commercial Sexual Exploitation of Children in South Africa*

Klain EJ (of the American Bar Association Center on Children and the Law) for the National Center for Missing & Exploited Children *Prostitution of Children and Child-sex tourism: An Analysis of Domestic and International Responses* (April 1999)

Molo Songololo *The Trafficking of Children for Purposes of Sexual Exploitation-South Africa* (2002)

Molo Songololo *About the Children's Charter* 1992

Muntarhorn V *Extraterritorial Criminal Laws Against Child Sexual Exploitation* (1998)

National Programme for Action for Children Steering Committee through the Office on the Rights of the Child in the Presidency *National Report on Follow-up to the World Summit for Children* (December 2000)

Nogushi Y *Child Labour and Child Exploitation*, Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England, September 2001

O'Connell Davidson J & Sanchez Taylor J *Child Prostitution and Sex Tourism: South Africa* (1996)

O'Connell Davidson J *The Sex Exploiter*, World Congress Against the Sexual Exploitation of Children, Stockholm, Sweden (August 27-31, 1996)

Ozinsky S (Cape Town Tourism) *Marketing: Responding to the Demands of Tourists* (17 October 2001)

Peterson V, Head of department: Social Services *keynote note address title Child Sexual Exploitation is an Open Secret*, Sex Tourism "Myth or reality" Conference, 16 October

Rakgodi (Secretariat for Safety and Security, Gauteng Province) *Sex Work: Decriminalisation* (2003)

Rosa S *The interpretive use of the Convention on the Rights of the Child in judicial decisions affecting children's socio-economic rights in South Africa* (March 2005), a Paper presented at the 4th World Congress on Family Law and Children's Rights

Shahinian G *Trafficking in Women and Girls* (8 November 2002)

Sexual Offences and Community Affairs (SOCA) Unit, National Prosecuting Authority *Current South African Legislative Framework in Relation to the Trafficking in Persons International Instruments*, supplied by Advocate Nolwandle Qaba in 2005

South African Human Rights Commission (SAHRC) *Report on Sexual offences against Children: Does the Criminal Justice System Protect Children?* (April 2002)

StatsSA *Survey of Activities of Young People in South Africa* (1999)

Streak “The extent and provincial distribution of poverty in South Africa 2000” in *Are the Poor Children being put first? Child Poverty and the Budget 2000* (2000), produced by the Budget Information Service of IDASA (The Institute for Democracy in South Africa)

Swiss Agency for Development and Cooperation *Easy Money: a Report on Child Labour in Tourism* (1999)

The Children’s Charter of South Africa, adopted on 1 June 1992

Van Bueren G *Child Exploitation and the Law: A Report on the International Legal Framework and Current Legislative and Enforcement Responses*

Van Niekerk J *The Latest Version of the Criminal Law (Sexual Offences) Bill* (May 2006).

Wako *Towards an African Charter on the Rights of the Child* (May 1998) 7, paper delivered at a workshop on the Draft Convention on the Rights of the Child in Nairobi

Webster G *The Protection of Children from Violence* (July 2001), Paper presented to the World Congress on Family Law and the Rights of the Children and Youth, Bath England, September 2001

Whitcomb, De Vos & Smith for Education Development Center, Inc., & ABA Center on Children and the Law *Program to Increase Understanding of Child Sexual Exploitation, Final Report* (1998)

World Vision UK “No Child of Mine!” *Opening the World’s Eyes to the Sexual Exploitation of Children* (April 2002)

INTERNET SOURCES

Carew D “Government clamps down on child pornography” at <http://www.iol.co.za> (Date accessed: 18/01/2006)

Childline “Policy Making” at http://www.childlinsa.org.za/sexual_offences.htm (Date accessed: 2/02/06)

“Country Information: South Africa” http://www.child-hood.com/en/text_p425.html (Date accessed: 7/04/03)

Department of Justice and Constitutional Development “The Legislative Process” at www.doj.gov.za/2004dojsite/legislation/legprocess.htm (Date accessed: 14/06/06)

Division for the Advancement of Women “Convention on the Elimination of all Forms of Discrimination against Women” found at <http://www.un.org/womenwatch/daw/cedaw/>. (Date Accessed: 16/09/04)

Division for the Advancement of Women “What is an Optional Protocol at <http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>(Date accessed 30/01/06)

ECPAT UK “Child Sex Tourism” at <http://www.ecpat.org.uk> (Date accessed: 26/10/05)

ECPAT “Opening address: ECPAT international’s regional consultation on the trafficking and sexual exploitation of children in Southern Africa Johannesburg, March 3-6 2002” at <http://www.socdev.gov.za/Statements/2002/March/ecpat.htm> (Date accessed 26/02/03)

Hechler D “Don’t!Buy!Thai!-Child Sex Tourism” at <http://www.geocities.com/CapitolHill/Senate/8931/dbt-rep.htm>(Date accessed:14/05/03)

Media and Gender monitor “Cape Fearless: Illita labantu fighting women and child abuse” at <http://www.wacc.org.uk/publications/mgm/o3/illita.htm> (Date accessed: 2/21/03)

Motlounge “NPA defends ‘sex tourist’ plea bargain” 30 November 2005, 01:14 at <http://www.mg.co.za> (i.e Mail & Guardian Online) (Date accessed 27/01/06)

National Center for Missing and Exploited Children “What is Sex Tourism of Children?” at <http://www.missingkids.com> (Date accessed 27/10/05)

Permanent Mission of South Africa :Press Release “South Africa deposits its Instrument of Ratification to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography” 30 June 2003 found at <http://www.southafrica-newyork.net/pmun/speeches/rightsofthechild.htm>. (Date accessed: 16/09/04)

Preda Foundation Inc. “South African child sex industry growing rapidly” at <http://www.preda.org/research/r00120705.html> (Date accessed: 21/02/03)

Preda Foundation Inc. “Success in battle against sex tourism” at <http://www.preda.org/research/r01021003.html> (Date accessed: 21/02/03)

Preda Foundation Inc. “UNICEF Child sex trafficking must end” at <http://www.preda.org/research/r00012303.html> (Date accessed: 21/02/03)

Rakgodi S “Sex Work: Decriminalisation”(a paper presented by the Secretariat for Safety and Security, Gauteng Province” at <http://www.sn.apc.org/sadc-pvaw/papers/sexwork.html> (Date accessed: 5/03/03)

Roberts “Swiss ‘sex tourist’ walks away with fine for South Africa child rape” at <http://www.Blackbritain.co.uk/news/details> (Date accessed: 27/01/2006)

Roper C “Sex with kids ‘a bargain’ in SA” 30 November 2005, 08:53, at <http://www.news24.com> (Date accessed: 27/01/06)

SAHRC “SAHRC Calls for Action on Child Sex Work” at <http://www.sahrc.org.za/sahrc/cms/publish/article136.shtml> (Date accessed: 14/09/05)

SALC “Press Statement: South African Law Commission: Project 107: Sexual Offences” at http://www.doj.gov.za/m_statements_/2003/2003_01_21.2.sale (Date accessed: 4/04/04).

Sapa “Swiss ‘sex tourist’ nabbed in Sandton at <http://www.mg.co.za/article> (Mail & Guardian Online) (Date accessed 27/02/2006).

Sapa “Swiss ‘sex tourist’ caught in the act” 10 October 2005 at <http://www.iafrica.com/news/sa> (Date accessed: 27/01/06)

Sapa “ ‘Sex tourist’ fined, released” 29 November 2005 at <http://www.iafrica.com/news/sa> (Date accessed: 27/01/06)

Sapa “Swiss man arrested for sexually abusing boy (14)” October 09, 2005, 15:45 at <http://www.sabcnews.com> (Date accessed: 27/01/06)

Sapa “Swiss man stays in jail after alleged sex crime” 17 October 2005, 19:45 at <http://www.sabcnews.com> (Date accessed: 27/01/06)

Saunders P “Sexual Trafficking and forced Prostitution of Children” (a presentation at a Journalists’ Seminar, New York City, 29 October 1998) at <http://www.walnet.org/csis/papers/saunders-childpro.html> (Date accessed: 5/03/03)

South African Press Association, Johannesburg “Almost one Third of SA Children Abused-SAHRG” April 23, 2002 at <http://allafrica.com/stories/200204240007.html> (Date accessed 7/05/03)

Swindell S for the 2001 Free our Women Campaign: “Child sex trafficking on rise in Africa” at <http://www.midhnottsol.org./fow/r004.html>(Date accessed: 21/02/03)

TED Case Studies “Nepal sex trade” at <http://www.american.edu/projects/mandala/TED/nepalsex.htm> (Date accessed: 27/10/05)

The Namibian “SA’s child sex shame revealed” at <http://www.namibian.com.na/netstories/2000/August/africa/009CD4F0E0.html> (Date accessed 21/02/03)

UCSB’s SexInfo “Sex Tourism” at <http://www.soc.ucsb.edu/sexinfo/?article=violence&refid=018> (Date accessed 24/04/03)

UNICEF “UNICEF-assisted programmes in the area of: Children in need of special protection measures” at www.unicef.org/crc/protection.htm) (Date accessed 13/09/04)

United States Embassy “World Congress against commercial sexual exploitation of children” at <http://www.usis.usemb.se/children/csec/backgrounder1.html> (Date accessed 21/02/03)

US Department of Justice “Sex tourism” at <http://www.usdoj.gov/criminal/ceos/sextour.html> (Date accessed: 26/10/05)

Vall J “Denial won't make child sex tourism go away, told conference” 17 October 2001 Cape Argus at <http://allafrica.com/stories/printable/200110170046.html> (Date accessed: 22/10/2001)

World Vision “Child sex tourism prevention” at http://www.domino201.worldvision/wvuswfo.nsf/stable/globalissues_stp (Date accessed: 16/10/05)

101 Website Advise “What is the Internet” at <http://www.anownsite.com/local-business/what-is-internet.html> (Date accessed: 20 April 2004)